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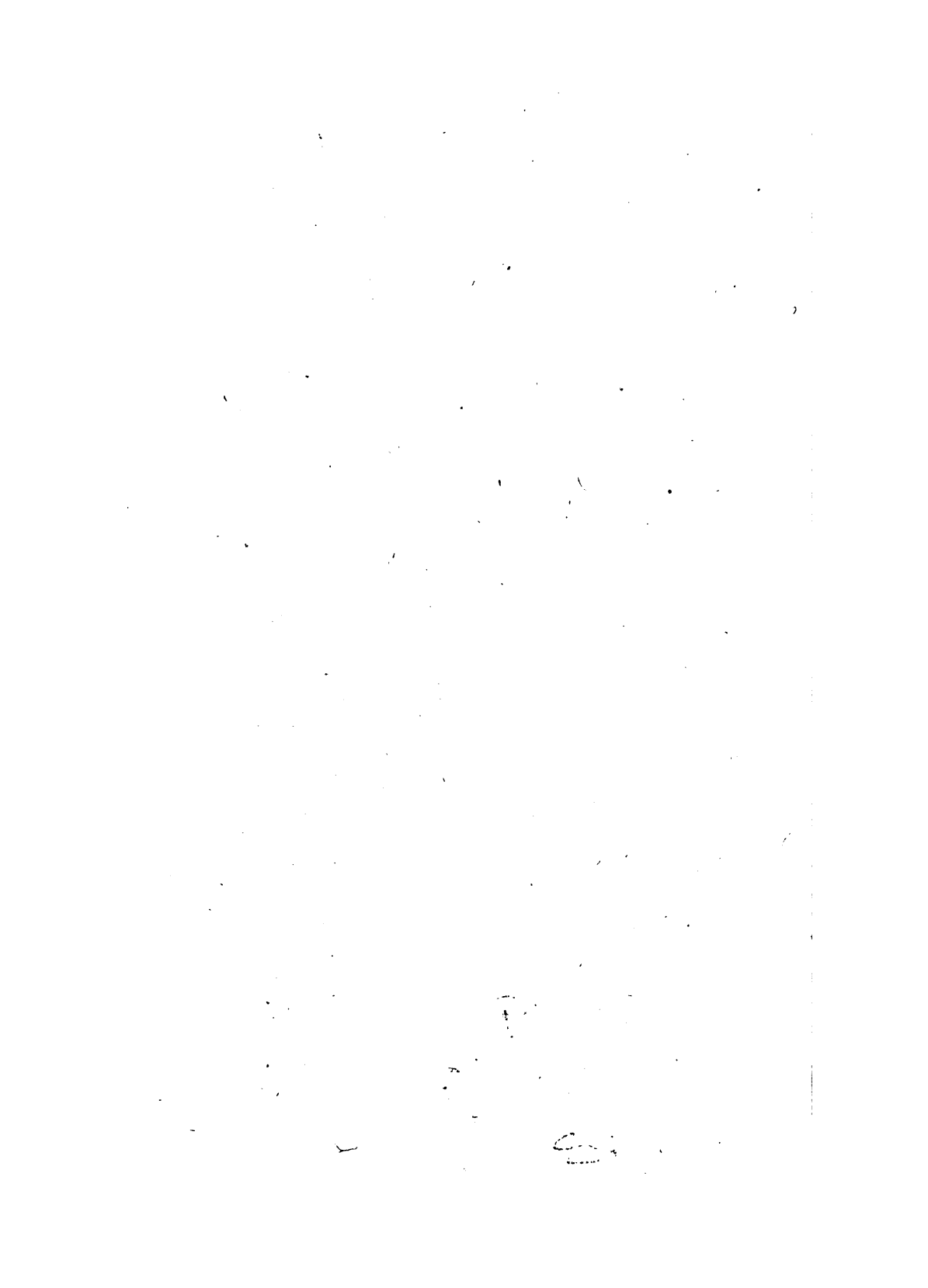
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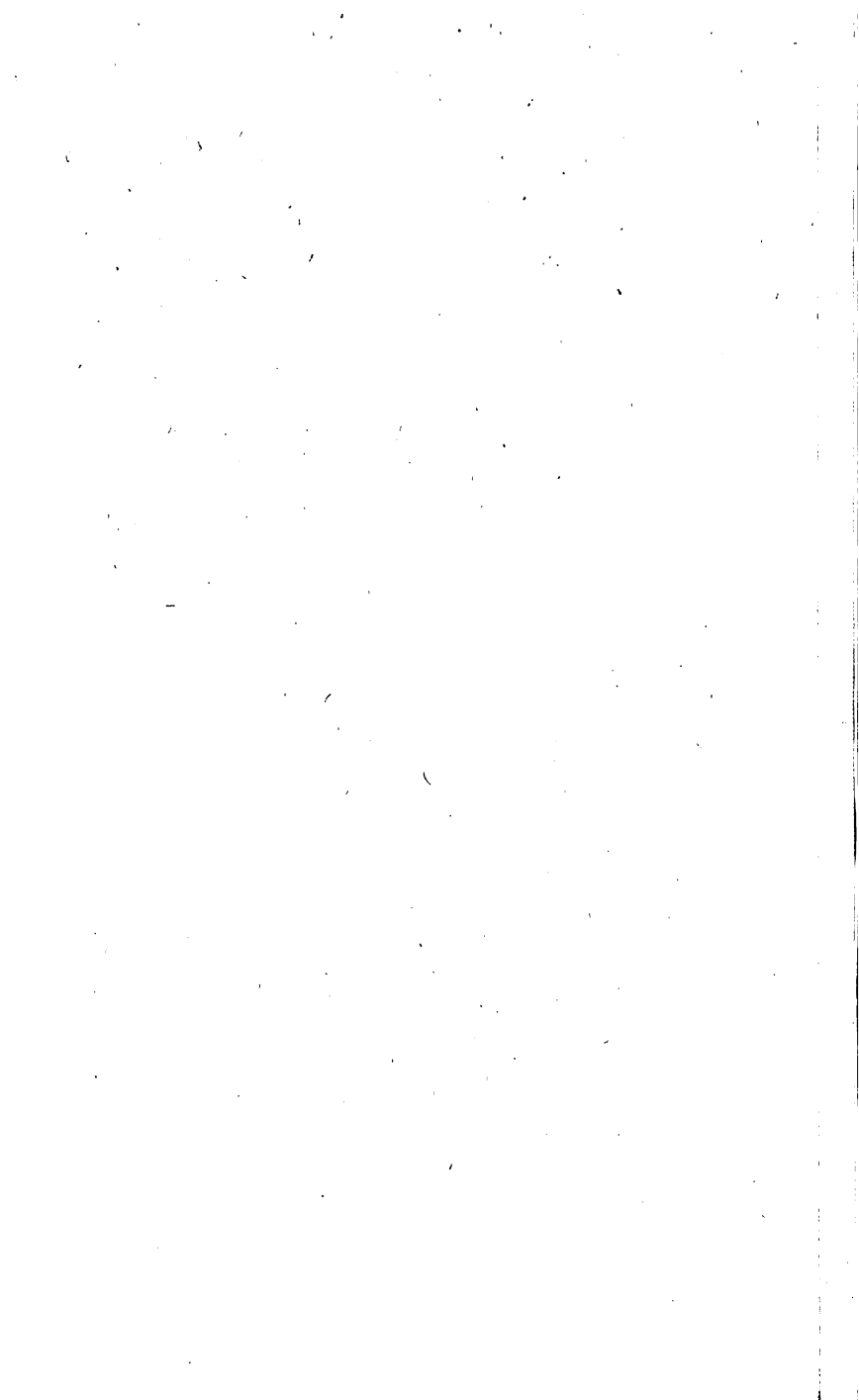
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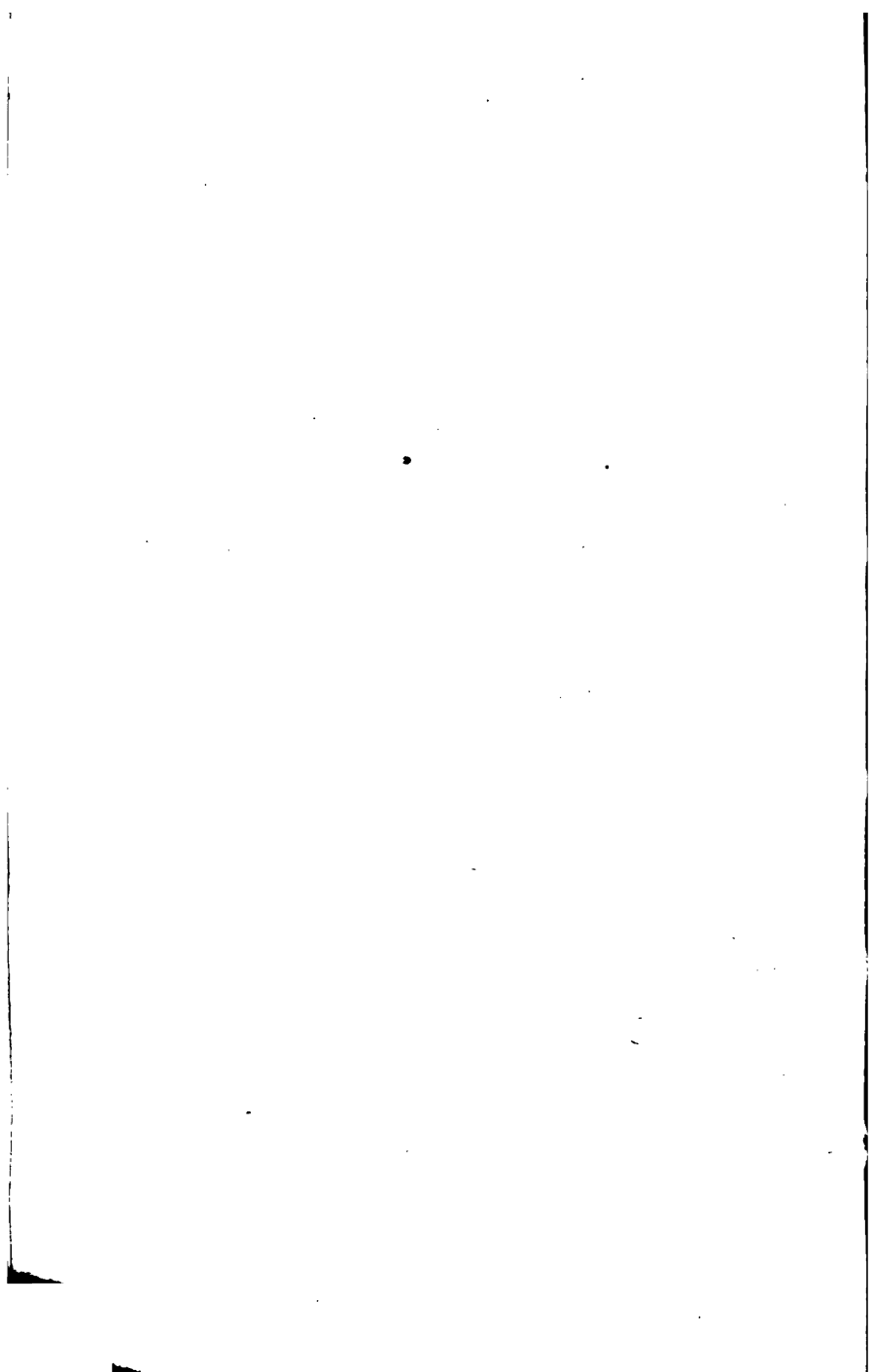






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THE RECALL



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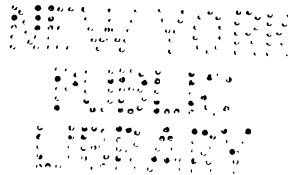
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THE RECALL

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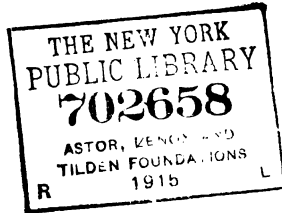
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EDITH M. PHELPS

Second Edition Revised and Enlarged



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EXPLANATORY NOTE FOR FIRST EDITION

Like the other volumes in this series, this handbook has been compiled for the especial benefit of students and debaters, and for libraries desiring to meet the needs of their patrons for reference material on this subject. The volume contains reprints of valuable material covering the history and present status of and the arguments for and against the recall, including the recall of judges and of judicial decisions. Briefs are given for the recall of judges and of decisions, but it has not been considered necessary to include one for the general recall as the brief for the recall of judges can be easily adapted for the purpose. The bulk of reprinted matter has been devoted to the judicial recall also, as this seems to be the most popular and important, and many of the arguments are the same as for the general recall. A map has also been included showing the progress already made by the state-wide recall in the United States, and the main features of the various state provisions can be compared by means of the accompanying tabulation.

August, 1913.

EXPLANATORY NOTE FOR SECOND EDITION

Since the first edition was published Kansas and Louisiana have been added to the list of states having the recall while proposed constitutional amendments providing for it were rejected in Minnesota, Texas and Wisconsin. This volume has been strengthened by the addition of new references to the bibliography and of reprints of important articles which have appeared since the first edition was issued. The map and comparative table have also been brought down to date.

E. M. PHELPS.

February 8, 1915.

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BRIEFS

RECALL OF JUDGES

Resolved, That judges should be made subject to recall.

INTRODUCTION

- I. It is asserted that numerous evils exist in our judiciary system.
 - A. Our courts have been severely criticized.
 - 1. By members of the bench and bar.
 - 2. In the press and on the platform.
 - B. Many suggestions have been made for the reform of courts and of judicial procedure.
- II. The recall of judges has been adopted as a remedy for these evils.
 - A. It is now in force in Oregon, California, Arizona, Nevada, Colorado and Kansas.
 - B. Other states have taken steps providing for its adoption.
- III. There is serious and determined opposition to the further adoption of the recall of judges.
 - A. Committees have been appointed to work against it.
 - B. Much literature has been disseminated in opposition.
 - C. President Taft refused to admit Arizona to statehood until the clause providing for the recall of judges had been eliminated from her Constitution.

AFFIRMATIVE

- I. There are many evils in our present judiciary system.
 - A. The delay and expense of litigation is too great.

- B. Decisions are based on legal technicalities and outworn precedent rather than reason and common sense.
 - C. The courts have usurped legislative functions.
 - D. The judiciary has become the bulwark of special privilege.
- II. The recall of judges is needed to correct these evils.
- A. Impeachment has failed as a remedy.
 - B. The fact that the recall could be exercised would cause the judges to feel more keenly their responsibility to the people.
 - C. Corrupt and inefficient judges would be deprived of office.
 - D. The good judge would be protected in the performance of duty.
 - E. The courts would be removed from the influence of corrupt interests.
- III. The recall of judges is desirable for other reasons.
- A. It is the application of good business principle to government affairs.
 - B. It is constitutionally sound.
 - 1. It is consistent with the republican theory of government.
 - 2. It has proved constitutional in the states where it has been exercised.
 - 3. There is sound precedent in our governmental institutions for its use.
 - C. It would be beneficial to the people.
 - 1. It would restore the confidence of the people in the courts.
 - 2. It would arouse people to a more intelligent study of candidates.
 - D. Short terms and frequent elections of judicial officers would be unnecessary if the recall were available.
 - 1. Judges could be elected for life, subject only to removal for inefficiency or malfeasance in office.
- IV. The recall of judges is not dangerous as has been asserted.

- A. It would not be abused.
 - 1. People are conservative and would use it only on great provocation.
 - 2. They are capable of using it wisely.
 - a. They are as competent to recall as to elect.
 - 3. It would not become the tool of vicious interests.
 - a. If this were likely to be the case, these interests would not fight it so bitterly.
- B. It would be exercised sparingly.
 - 1. The fact that it could be utilized if necessary would generally be sufficient.
- C. The rights of the minority would not be disregarded.
 - 1. They would be safeguarded as they now are by the sense of responsibility and justice of the majority which is the preservation of law at all times.

NEGATIVE

- I. The evils of our judiciary system have been much exaggerated.
 - A. The courts have not usurped power to declare legislation unconstitutional.
 - B. They are not reactionary and unprogressive.
 - 1. It is their business to declare law and not to make it.
 - C. Many of the so-called evils are inherent in society and will remain so long as people are human.
- II. Such evils as do exist can be remedied without resort to the recall of judges.
 - A. Members of the bench and bar are already working to reform judicial procedure.
 - B. The existing remedies of impeachment and removal for cause can be made more effective.
 - C. The power of the courts to interpret statutes and to nullify laws by majority vote can be removed.
- III. The recall of judges would be undesirable for many reasons.

- A. It is inconsistent with our republican form of government.
 - 1. Ours is a representative and not a pure democracy.
- B. The independence of judges would be destroyed.
 - 1. Decisions would be influenced by popular sentiment.
 - 2. The rights of the minority would be subject to the will of the majority.
 - 3. Constitutional guarantees would be endangered.
- C. It would be unfair to judges.
 - 1. The method of procedure does not provide for a fair trial.
 - 2. Passion and feeling would prevail in the election instead of judgment.
 - 3. There would be loss of respect for the judiciary.
- D. It would be difficult to induce good men to serve as judges.
- E. The evils of our present system would increase rather than decrease.
 - 1. The uncertainties of litigation would be increased.
 - 2. The courts would become the tool of the bosses and corrupt interests.
- F. The people are not capable of exercising the recall wisely.
 - 1. They cannot understand the intricacies of law.
 - 2. They are too indifferent to take the trouble to secure correct information about candidates.
 - 3. If the people do not elect good officials, they cannot be trusted to recall those who prove unworthy.
 - 4. Recall elections would be left to the bosses and those in control of the nominations.
- IV. The recall of judges does not stand the test of experience.
 - A. The instances where it has been used show it to be vicious.

- B. Judges elected for life have been shown to be superior to those subject to frequent re-election or recall.

RECALL OF JUDICIAL DECISIONS

Resolved, That state constitutions should be so amended as to provide that when an act passed under the police power of the state has been pronounced unconstitutional by the courts, the legislature shall, after six months and within two years, submit the act to a vote of the people, and a majority in favor shall be sufficient to establish it as law.

INTRODUCTION

- I. Much recent social legislation, intended to relieve the injustices of our changing economic conditions, has been pronounced unconstitutional by the state courts on the ground that it is in violation of the "due process" clause of the Constitution which says that "no person shall be deprived of life, liberty or property without due process of law."
 - A. It is held that such legislation is not a proper exercise of the police power.
- II. As a remedy for this condition of affairs, Ex-President Roosevelt has proposed that "in a certain class of cases involving the police power, when a state court has set aside as unconstitutional a law passed by the legislature for the general welfare, the question of the validity of the law . . . be submitted for final determination to a vote of the people taken after a due time for consideration."
- III. This plan, the recall of judicial decisions, has received considerable support.
 - A. It has received the support of the dean of an important law school.
 - B. It is supported by the Progressive Party.
 - C. It has been adopted in Colorado.
 - D. It has been proposed in the Massachusetts legislature, and as an amendment to the Constitution of Illinois, and also to the Federal Constitution.

- IV. The American Bar Association has proposed, as an alternative, that the Federal Judiciary Code be amended to provide that all decisions made by a state court of last resort may be ordered by a writ of certiorari to be reviewed and reversed by the Supreme Court of the United States.
- A. As it is now, the Supreme Court cannot review any decisions where a state law has been pronounced invalid by a state court because repugnant to the Federal Constitution.
 - B. This proposal has been approved by the Senate of the United States.

AFFIRMATIVE

- I. The people have suffered injustice in many states because the courts have refused to admit much social legislation as constitutional.
- A. Such legislation has been instituted to remedy the injustices of our present social and economic conditions, and would improve very materially the welfare of our people.
 - B. Many judges have failed, both by education and experience, to come in contact with these conditions, and their decisions have been based on legal conventions rather than justice.
 - C. The "police power" has not been interpreted in accordance with present-day standards.
 - D. The "due process of law" clause has often been given a wider application than was originally intended.
 - i. That the courts do not agree on its interpretation is shown by the fact that the same or similar laws have been pronounced constitutional by the courts of some states and not of others.
 - E. Decisions are frequently made by a small majority of the court and hence one man is sometimes able to block the will of the whole people.

RECALL OF JUDICIAL DECISIONS xvii

- II. When acts passed under the police power of the state and affecting the well-being of the entire people are declared unconstitutional by the courts, the people should have the right to recall the decision.
 - A. The judges are the servants of the people and not their masters.
 - B. The people are as capable of interpreting the law as they are of enacting it.
 - C. Interpretation of the police power depends on prevailing moral standards and the people are best fitted to judge what these standards really are.
- III. The recall of decisions is preferable to other remedies that have been suggested.
 - A. Impeachment could not be resorted to in the case of such decisions.
 - B. Changing the act so as to secure a favorable decision from the courts would not be desirable.
 - 1. It would take too long.
 - 2. The act would be weakened.
 - C. Amending the due process clause of the constitution so as to prohibit state courts from reviewing such legislation is less desirable.
 - 1. Besides the delay, it is uncertain whether the court would consider itself bound to observe the amendment.
 - 2. It would be arbitrary and dangerous.
 - a. The legislature would be freed from necessary restrictions.
 - b. Constitutional limitations would be disregarded.
 - 3. The present difficulty is not with the constitution, but with the judges' interpretation of it.
- IV. The recall of judicial decisions would be desirable for other reasons.
 - A. It would not alter constitutional rights.
 - B. It would not disturb the courts.
 - C. It would remove the demand for the recall of judges.

- D. It would teach the courts what the will of the people really is.
- E. It is practicable.
 - 1. Ample time can be given for consideration.
- F. It is conservative.
 - 1. The principle of the recall is already established in our constitutions.
- V. The argument that the people have not the ability to understand judicial reasoning is unsound.
 - A. Much of this reasoning is outworn and unnecessary.
 - B. The decisions of the people cannot be more inconsistent than many of those which have been reached by the courts.

NEGATIVE

- I. It is necessary that the judicial function should be exercised by an entirely independent body.
 - A. Constitutional law must be kept distinct from statute law.
 - B. The separation of the legislative, judicial and executive functions of government must be preserved.
- II. The decisions of the courts in cases involving the police power should be final.
 - A. The term "police power" demands legal interpretation.
 - B. It is too vague to be left for interpretation to the legislature or to the people.
- III. The recall of judicial decisions is impracticable.
 - A. It is more cumbersome than existing methods of amending the state constitutions.
 - B. It could not be put into effect, except in cases involving state constitutional questions alone, without an amendment of the Federal Judiciary Code.
 - 1. Such amendment would be sufficient to remedy existing difficulties without resorting to the recall of decisions by the people.
- IV. The recall of judicial decisions is unnecessary.

- A. The present system of judicial procedure is flexible enough to overcome present difficulties in the way of progressive legislation.
 - 1. Courts are responding slowly but surely to public opinion.
 - 2. Judges should keep closer in touch with public affairs and render decisions more in accord with prevailing moral standards.
 - 3. If a law is pronounced unconstitutional by the courts, a new measure can be drafted which will meet constitutional requirements.
 - a. Many decisions are due to errors in drafting bills.
- B. If a change is necessary, there are other remedies less cumbersome and revolutionary than the recall of judicial decisions.
 - 1. It could be provided that legislation should not be pronounced unconstitutional unless the decision is concurred in by more than a bare majority of the judges.
 - 2. Easier methods of amending state constitutions could be provided where necessary.
 - 3. The Federal Judiciary Code could be amended so as to permit a wider appeal from state courts to the United States Supreme Court in cases involving the Federal Constitution.
 - 4. The "due process of law," "equal protection of the laws," and other clauses of a similar character could be removed from state constitutions, where these clauses merely duplicate limitations upon state action contained in the Federal Constitution.
- V. The recall of judicial decisions would be undesirable for other reasons.
 - A. Constitutional guarantees would be endangered.
 - 1. Necessary checks on legislation would be removed.
 - 2. Cases would be decided by the people with reference to expediency only, and with no regard for their legality.

BRIEFS

- a. The recall would be exercised in times of excitement and public feeling.
- B. The uniformity of law would be destroyed.
- C. It would be dangerous to the courts.
 - 1. The authority of and respect for courts would be lost.
 - 2. The independence and impartiality of judges would be destroyed.
 - a. Decisions would be influenced by public sentiment.
- D. It would decrease rather than increase the control of the people over political affairs.
- E. The people are not competent to exercise the recall wisely.
 - 1. They have not had the necessary legal training.
 - 2. They could not and would not inform themselves as to the merits of the cases.
 - 3. It would be difficult to ascertain from the results of the vote what the real decision of the people was.
- F. The recall of judicial decisions is inconsistent with our form of government.
 - 1. It is not republican.
 - 2. It substitutes mob rule for law.
 - 3. It exposes the people to the tyranny of the majority.

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TED.

<i>State</i>	<i>Date of enactment</i>	<i>Officers subject to recall</i>	<i>Majority of votes cast decides results</i>	<i>Time that must elapse after election before recall petition can be filed</i>	<i>Second petition cannot be filed during the same term</i>
Oregon	1908	All officers	Yes	Legislators, 5 days after opening of first session; other officers, 6 mos. after election	Unless petitioners pay expenses of first recall election
California	1911	All elective officers	"	"	Within six months of the first recall election
Colorado*	1912	"	"	"	"
Arizona	1912	All officers	"	"	Same as in Oregon
Nevada	1912	"	"	Legislators, 10 days after first session opens; other officers, 6 mos.	"
Idaho†	1912	All officers save judges			
Washington†	1912	All elective officers save judges			
Michigan	1913	"	Yes, in both elections	Legislators, 45 days; other officers, 3 mos.	"
Kansas	1914	All officers	Yes		
Louisiana†	1914	All elective officers save judges and justices of the peace	"	One year	Cannot

* Has also the recall of judges

† Further legislation is needed

INTRODUCTION

For the past few years the recall has occupied a place well to the front among the measures designed to give the people direct control of their government affairs. Originally a companion of the movement for the initiative and referendum, the recall is now considered distinctly on its own merits rather than as part of a larger scheme. The latest tendency is to broaden its scope to include judicial officers and even a special class of decisions rendered by the courts.

The recall has been defined as "a legal provision for the retirement of a public officer before his term of office expires, if he has forfeited the confidence of the voters." The manner in which it is employed varies considerably in the different states but the usual form of procedure is as follows: A petition, containing a brief statement of the charges preferred against the official sought to be recalled, and signed by a fixed percentage of the voters of the district from which he was elected is filed with the proper recording officer or clerk. If the petition is properly presented and bears the requisite number of signatures, within a stated time an election must be called at which the officer in question must stand for re-election, usually competing with other candidates for the same office. In most cases a majority vote decides the result of the election.

Although instances of the recall, or something closely resembling it, have been found in Greece and in the governments of the early Germanic tribes and of our colonies, it was first employed in its present form in Switzerland along with the initiative and referendum, where it is still used occasionally. The recent movement for the recall in the United States began in Los Angeles in 1903, where it was employed in a form very similar to that used in some of the cantons of Switzerland. San Diego, San Bernardino, Pasadena and Fresno adopted it in 1905 and Seattle followed suit a year later. The movement spread gradually, and the recall is now employed in many cities all over the United States. The states of Alabama, Idaho, Kansas, Louisi-

INTRODUCTION

ana, Nebraska, Nevada, New Jersey, North Dakota, Washington, Wisconsin and Wyoming, have passed state laws under which cities of a certain size may adopt charters providing for a commission form of government, and including provisions for the recall. Other states have permitted certain of their cities to adopt the commission form of government and many of these cities have included provisions for the recall in their charters.

Legislation providing for the recall of state officials has been adopted in the states of Oregon, California, Arizona, Nevada, Colorado, Kansas, Louisiana, Washington, Idaho and Michigan. In the first six states mentioned, the recall applies to judicial officers also, and in Colorado it has been extended to include the recall of judicial decisions. An amendment to the constitution of Arkansas providing for the recall of all state officers including judges, was accepted by the voters in 1912, but was held unconstitutional by the courts because the measure was not properly presented. The legislatures of Minnesota and Texas recently enacted legislation adopting similar amendments to their constitutions, and the legislature of Wisconsin adopted a resolution for the recall of all elective officers except judges, but these measures were rejected by the voters at the November, 1914, elections. Legislation for the recall has also been attempted in North Dakota, Mississippi, Ohio and Pennsylvania, but without success.

An interesting feature in the history of this recall movement is the increasing tendency to apply it to the judiciary, both to the judges themselves and to their decisions, and the serious opposition to such extension on the part of the American Bar Association. An illustration of this opposition was given when President Taft refused to sign the resolution admitting Arizona as a state into the union, until the clause in her constitution providing for the recall was amended to include the words "except members of the judiciary." This was done by special election on December 12, 1911, but after admission to statehood, the first legislature of Arizona proposed as a constitutional amendment that the recall be again extended to include judges, and this amendment was adopted in November of the following year.

For several years the American Bar Association has maintained a committee which has for its special object the carrying on of a campaign of education to show the harmfulness of the recall as applied to judges and to decisions. The 1913 report of this com-

shington states that over 350,000 pamphlets were distributed during the year alone, in addition to securing the publication of many articles in newspapers and magazines. Public discussions have been participated in on many occasions especially in states where the subject was under discussion in the legislature.

The newest feature in the recall movement is the attempt to apply it to the recall of judicial decisions. This form of recall has been first proposed in modern times in the Australian Constitutional Convention of 1895-1901, where it was discussed and finally rejected as repugnant to the proposed Constitution. When the Constitution was adopted in 1901 and established a judicial system very similar to that of the United States with practically the same functions. Colonel Roosevelt, first in his editorials in the Outlook and then more definitely in his Columbus and Carnegie Hall speeches, urged the adoption of the recall of decisions upon the states of this country, as more effective to accomplish what he considered most desirable to obtain—that is a remedy for that class of decisions of the courts where legislation passed for the social welfare has been pronounced unconstitutional because it violated the “due process of law” clauses of the Constitution. Colonel Roosevelt has defined his plan as follows:

“I am proposing merely that in a certain class of cases involving the police power, when a state court has set aside as unconstitutional a law passed by the legislature for the general welfare, the question of the validity of the law be submitted for final determination to a vote of the people, taken after due consideration.”

So far the only state to adopt the recall of decisions is Colorado, although similar laws have been proposed in Illinois and Massachusetts, and even in the Senate of the United States. While no trial has yet been made of the recall of decisions in Colorado, the form in which it was enacted seems to have given rise to a curious situation. Mr. Rome G. Brown, Chairman of the Committee of the American Bar Association to Oppose the Recall, says:

“The recall of judicial decisions in Colorado applies . . . to all decisions of the Supreme Court declaring unconstitutional as contravening the state or federal constitution, not only any law of the state, but also charter provisions or charter amendments of cities acting under Chapter XX—that is, all cities of

the first and second class having home charters. In the case of these cities, the decision of the Supreme Court may be recalled by the majority of the votes actually cast at an election of the city in question called upon to pass upon the decision. This is the establishment of a sort of 'local option' as to the enforcement of constitutional limitations. It is manifest that this illustrates the viciousness of the decision recall. One city might uphold the Constitution and another might abrogate it, both as to the same provision. More than that, the same city might vote to uphold a certain constitutional provision in one case, and later abrogate it in an exactly similar case."

Since the recall of judges and the recall of decisions involve questions not belonging to the discussion of the general subject of the recall, it has seemed desirable to group the reports, making a separate division of the book for each of the three questions. The bibliography has been similarly subdivided, and two briefs are furnished. Students desiring material in opposition to the judicial recall will find it advisable to keep in touch with the Committee of the American Bar Association to Oppose the Recall, to whose chairman, Mr. Rome G. Brown of Minneapolis, grateful acknowledgment is made for the loaning of material for examination and for much valuable information.

E. M. PHELPS.

February 8, 1915.

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THE RECALL

GENERAL DISCUSSION

Annals of the American Academy. 43: 216-26.

September, 1912.

Recall—Its Provisions and Significance.

H. S. Gilbertson.

The Growth of the Idea

For the first legal enactment of the recall principle we are indebted to the charter of Los Angeles, which contained the provisions first in 1903. During the next four years a number of other California cities adopted the idea. In 1906 it was incorporated into the charter of Seattle, Wash. Soon also the initiative and referendum advocates of Oregon became interested in it as a supplement to their own "People's Power" measures, and by employing the initiative, they succeeded in getting it inserted in their constitution in 1908, where it was made applicable to all elective officers, local and general, including the judiciary. It may then be said to be one of the peculiar contributions of the Pacific coast to the present movement, a movement that looks toward a more direct participation of the rank and file of the people in affairs of government.

But the circumstance which gave to the recall its greatest vogue was its incorporation in the commission government laws of Iowa, and almost simultaneously into those

of South Dakota and Dallas, Tex. This was in 1907 and since it has shared in the publicity which has attended the spread of that form of government. It is, however, not an essential part of the commission plan, and this the Galveston people would have us at all times to understand. But so closely are the two ideas associated that the recall is now a part of every state-wide commission government law, except those of Utah and Kentucky, and of fully three-fourths of the special charters. The relative simplicity of this form has also made the recall a far more feasible and logical adjunct than is perhaps the case with our typical forms of state and local government. For, where, as under the "commission" scheme all the elective officers are directly concerned with public policy, the individual citizen has every reason to concern himself with their official conduct. Moreover, responsibility for the acts of government is so much more definitely fixed that action under the recall is more apt to be well-aimed and effective. And again, the persistent demand for "checks" in our political thinking finds some satisfaction in the recall, when, as under the commission plan, the theory of the separation of powers has been cast aside for a system in which the unity of the organization is bound up in the single group of elective officials.

As a proposition applicable to state officers, it has a slower road to travel. Following the example of Oregon, the nascent State of Arizona sought to make it a part of her system, without taking the precaution of excepting the judiciary. The veto of this measure in its original form and its repassage so as to exclude the judiciary from the recall provisions are a matter of common knowledge and can receive only passing mention here. But the California constitution, by amendment adopted October 10, 1911, permits the recall of all elective officers including judges. Idaho and Nevada will vote in 1912 on similar amendments.*

The application of the recall to state officers in its earlier days faced a possible constitutional obstacle in the obliga-

*Since this article was written Arizona and Nevada have passed laws providing for the recall of judges, and Idaho has enacted similar legislation except that judges are excluded.—Comp.

tion imposed upon the states to maintain a republican form of government. This difficulty was finally cleared up by the supreme court in the case of *The Pacific States Telephone Company v. The State of Oregon* (223 U. S. 118) wherein it was decided that all questions as to the form of state government are political and not judicial and lie outside the jurisdiction of the courts.

In the absence of any judicial definition of republican government it is impossible, of course, to determine whether or not the recall is inconsistent with it, and until congress intervenes, the recall is good political practice.

Founded on the Right of Petition

The recall has something more than a mere experimental foundation. As in the case of many another chance creation of politics it turns out that its fashioners, unconsciously perhaps, have built upon a solid basis of thoroughly accepted political principles which are a vital part of our American political system. And of these principles the first is the well-grounded right of petition, which is one of the chief pillars of our national bill of rights. In the historic sense, this right, to be sure, is limited, and so far as direct remedies are concerned, impotent. The recall amplifies it and makes it dynamic by supplementary provisions. Petitions, thereby, are taken out of the category of publicity schemes, as they were, for instance, when John Quincy Adams was forcing his colleagues in congress into the open on the slavery issue. They are expanded into political instruments capable of producing direct and certain results. They set up a remedy in addition to a right, for under the recall a body of electors may not only express their disapproval of the public course of an officer, but they may carry out their disapproval directly to the point of removal through the mandatory provisions of the law,

In this process the state is more than a passive partner. It goes more than half way to facilitate the exercise of this new right, by becoming accessory in several district processes:

The law supplies the blank forms of petition and requires them to be certified against fraudulent signature.

The law requires a ministerial officer to examine into and certify the sufficiency of the petition to the officer or body authorized to call elections.

The law requires the officer or body in charge of elections to submit the subject matter of the petition to an election, to the voters, and to take all the incidental steps in this action and to incur the attendant expenses.

The law puts into effect, automatically, the mandate of the voters.

Political Character of the Recall

✓ But what of the nature of the petition? Herein is the key to a new conception of elective public office in that a new basis of tenure, short of a fixed term, is set up, a tenure not dependent upon judicial, but upon political considerations. For though elective public office in this country has never been considered in terms of property or contract, there has been heretofore a fixed tradition that removal should be accomplished only by legal formula which may be termed "due process of law." This means the establishment of cause for removal, due notice and a hearing upon charges. Often in practice, the observance of this formula is formal and perfunctory, but the fictions of the law at least are followed.

The recall laws change all this by providing specifically that the subject matter of the petition may be couched in most general terms, for the information of the signers only.¹ It is not to be taken as a series of formal charges. And if this fact in itself is not enough to preclude attacks on the validity of the petition on technical legal grounds, the laws especially provide that this general statement shall not be subject to review in any case. The only "due process" is a political one. ✓

Nor has the political nature of the recall been overlooked in actual practice. In none of the cases in which it has

¹ The charter of Oakland, Cal., has what is perhaps a more equitable provision in this connection, from the standpoint of the officer involved. Under this law the originators of the petition must, before circulating it, give notice of their intention to do so, by filing with the city clerk the reasons for their action. The officer sought to be removed is then allowed to place upon the petition a statement in defense of his course in office.

been invoked does there appear to have been any effort to bring to light the definite evidence of malfeasance under the statutory definitions, which would support legal indictment. If such evidence existed in the mayoralty cases in Los Angeles and Seattle, no effort was made to formulate it. And in all the others the action for removal was put entirely upon grounds of public expediency. Thus, in Dallas, in the elections of 1910 and 1911, in each of which two of the school directors were removed, the question at issue was the dismissal of certain teachers. In Tacoma it was that of generally inefficient and inharmonious administration. During the past winter an effort was made in Berkeley, Cal., to remove three school directors on the sole ground that they had dispensed with the services of the superintendent of schools. In Huron, S. D., the removal of the commissioner was sought on the ground of increase in the tax levy. In the more or less confused contest which took place in Wichita, Kan., the difficulty seems to have been mainly over the submission of a proposition to purchase a public utility plant. Similar issues of policy seem to have underlain the movements which were instituted in San Bernardino, Cal., and in McAlester, Okla., and Shreveport, La.

Recognition of Minorities

The right of petition is essentially a haven for minorities. There is no minority too small to make itself heard in this way. But once the petition becomes a self-executing instrument, as under the recall system, a question arises as to how large a minority need be to gain the official recognition which will set the machinery of removal to work. Practically, the question may be put in this way: When is a petition serious enough to justify the call for a popular election?

To this question, if the recall is to become a permanent feature of our institutions, a good deal of careful consideration must be given. The interest of the people is not only in making public officers responsive to its genuine wishes, but in accomplishing this result with the least possible friction, both to the officers and to the electorate. In making this adjustment the private interests of the officer

as such, sink into significance. Whatever protection of tenure he gets is incidental to "the larger good." This is the philosophy of the "new democracy" in which the recall is so important an element.

The actual application of the recall principle appears to have reflected a social psychology which makes the adjustment between the interests of the whole people and the demands of the minority, on the basis of local conditions. The importance of the petition is usually measured by the ratio of the number of its signers to the whole number of votes cast in the constituency at the last preceding general election, or the total number cast for the officer in question. When, as in Oregon, California and South Dakota, the socializing influence in politics is noticeably strong, the doubt has been resolved in favor of the whole people. This means a low requirement in the percentage of petitioners. On the other hand, such communities as Illinois, in which a recognition of the recall principle has been wrung from a reluctant legislature, the percentage is prohibitively high. A general average of all the laws would place the percentage somewhere near twenty-five.² Such a figure is not prohibitive and in all the communities in which the recall has been

² Twelve per cent for state officers in California, with special restrictions.

Fifteen per cent under the commission government laws of South Dakota and under the special charters of Oakland, Modesto, Vallejo and Santa Cruz, California.

Twenty per cent under commission government laws of Washington, and the special charters of Grand Junction, Colo., Mankato, Minn., Pontiac, Mich., Fort Worth (registered voters) and Denison, Tex., Parkersburg, W. Va., and Stockton, Cal. Wyandotte, Mich., and Lowell, Mass.

Twenty-five per cent under commission government laws of Montana, Wyoming, New Jersey, Kansas and the special charters of San Luis Obispo and Eureka, Bartlesville and McAlester, Sapulpa, Okla., and Austin, Tex., Lawrence and Haverhill, Mass., Gardiner, Maine.

Thirty per cent in Ardmore and Enid, Okla., Colorado Springs, Col., and under the Nebraska commission government laws.

Thirty-three per cent under the commission government law of Louisiana.

Thirty-three and one-third per cent under the Wisconsin commission government law, and the special charter of Corpus Christi, Tex.

Thirty-five per cent in Dallas, Tex., Oklahoma City and Tulsa, Okla., Wilmington, N. C., and general commission government law of Idaho.

Forty per cent under the special charters of Holdenville, Okla., and Knoxville, Tenn.

Fifty-five per cent under commission government law of Illinois.

brought to the point of the election, a twenty-five per cent petition has been indicative of a very real public sentiment. In a number of the commission government cities which have this percentage, abortive efforts to remove officers have made their appearance only to be proved ridiculous.* Politicians have freely asserted that the recall is a two-edged sword, quite as effective in the hands of unscrupulous trouble-making office hunters as in those of public-spirited citizens. They have worked on this theory in some cases, and with little encouragement, as in the attempt made in Tacoma during the past year to oust the mayor, who had himself been chosen in a removal election. It is the writer's belief, also, that public officers will shortly cease to feel, if they do feel, any insecurity in their positions from the mere fact that a political enemy is seeking to use this public instrument for private ends. Twenty-five per cent petitions are not always easy to secure, even when signatures are purchased, unless the cause is one in which the voters generally take a rather keen interest.

The Expression of Majority Opinion

The placing of a completed petition in the hands of the city clerk or a like officer, fastens upon him the purely ministerial duty of determining, within ten days, its sufficiency, and of certifying the fact to the officer or board empowered to call elections. But during this period every opportunity must be given the signers to put their petition in proper form, and the insufficiency of one petition does not preclude the right to present another.

The functions of the election-calling officer or board are likewise ministerial. If a special election is necessary, as is usually the case, the necessary funds must be appropriated⁴ and an election called for a date within the period fixed by law.

* Instances of this character have taken place in Colorado Springs, Des Moines, Haverhill, Tacoma and Seattle.

⁴ The Oregon law requires that the expense of a second election for the recall of the same officer shall be borne by the petitioners, who are required to deposit the necessary amount in advance.

In this way the mechanism has been developed to the point where it involves a general popular expression which it has been the ideal of the recall laws, apparently, never to stifle, but always to facilitate.

But the recall is by no means a broad concession to the revolutionary or "adventurous" elements of the people. Against fictitious expressions of opinion or ill-considered action the laws make a very definite provision. For at the point where the procedure brings the whole electorate for final discussion is placed a barrier against anything like popular passion. This consists of the simple but effective element of time. Every recall law provides that, subsequent to the completion of the petition and before the calling of an election, there must elapse a goodly period of time. This is never shorter than twenty nor longer than ninety days. In this way the recall legislation undertakes in advance to take care of the mob, and its characteristic impulsiveness. Wherever the recall has been invoked, this period has been employed in active and thorough public discussion.

Can a community be maintained at a high pitch of anger, enthusiasm or interest to the detriment of a public officer for a period ranging anywhere between three weeks and three months? Possibly. But, at least, the laws have not neglected this factor. If the official conduct of an officer is sufficient to interest a respectable percentage of the voting community for such a period, the question of his removal by that fact alone, would seem to be a matter of serious public policy. Publicity to the last degree is a well accepted specific for political ills under a democracy. The recall laws make ample provision for this.

This brings us to the manner of removal in the last instance.

The rough analogy between the various stages of the recall processes to "due process" of law under the older forms of removal breaks down completely when we consider the manner in which the proposition is placed before the jury of the people on the election ballot.

For at this stage the whole matter is not, as a rule, put up to the voter as a simple, unmingled issue of removal as

against removal.⁵ It is the question of retaining the incumbent in office or electing a successor. When the process of petitioning is over the officer under attack is given an option between resigning and becoming a candidate for the job of filling his own office for the remainder of his unexpired term. He is, in fact, such a candidate and his name is placed upon the ballot, unless he expresses a wish to the contrary. The petitioners who often, as a matter of practice, constitute a more or less distinct faction, or temporary party, proceed to nominate an opponent by petition.

Upon the ballot, provision is usually made for a statement of the reasons for the sought-for removal, and the counter statement of the officer, justifying his course in office. These recitals, as in the original petitions, because of their brief and general character may take on a decided political color.

As to the sufficiency of the final verdict of the electorate, most of the laws require that the successful candidate shall receive a majority of all votes cast; the remainder stipulate the highest number of votes after the practice of regular elections. In either case the number may be considerably less than was required for choice at the original regular election, for of the laws in effect, none thus far fixes a minimum number of votes to establish the validity of a removal election.

Such, in general, is the groundwork of recall legislation. Minor features have been added from time to time to some of the laws. One of these protects the officer for a given period from recall, after the beginning of his term of office. In most cities this is from three to six months. Under the New Jersey commission government law it is one year, the whole term of office being four years in this case.

By charter amendment in 1911 the city of Los Angeles has extended the recall to all appointive officers. This is a step which suggests a series of very debatable questions from the standpoint of responsibility which cannot be dealt with here. The new commission government law for Mis-

⁵ There are exceptions to this rule however. Under the charters of Austin, Tex., and those of Sacramento and Modesto, Cal., the question of removal is presented as an entirely separate one from the election of a successor. The Los Angeles Charter Revision committee contemplates a similar change.

Mississippi has a like provision. The new charter of Lawton, Okla., attempts to meet the objections to irresponsible petition-peddling by requiring every signer to appear in person at the city hall when affixing his signature.

An important variation from the typical plan outlined above is found in the Boston charter, adopted in 1909. This is based upon a rather different theory of official tenure. Under this act the mayor is elected for a term of office of four years, unless recalled at the end of the second year. No petition is necessary to submit the proposition to the voters; it is put in the ballot as a matter of course. Unless the mayor is recalled by an advance majority vote, he becomes by tacit consent of the electors, as it were, his own successor. But the Boston arrangement is not only a variation from the general plan in form. It fails to provide the machinery for continuous control by the electors, which is the very essence of the recall principle.

**American Bar Association. Report of the Committee to
Oppose the Judicial Recall. 1913.**

Besides its adoption in Oregon and California by constitutional amendment, the Recall of Judges has been, within the past year, made a constitutional provision in the states of Arizona and Nevada. It has been recently voted by the legislatures of the states of Kansas and Minnesota, to be submitted as a constitutional amendment for adoption by the people. At the last election in Colorado, constitutional amendments for both the Recall of Judges and for the Recall of Judicial Decisions, initiated by the people under the Initiative and Referendum, were adopted.

In Arkansas, a constitutional amendment for the recall of judges, initiated by the people, was passed at the 1912 election; but the state Supreme Court held that it had not been properly submitted and, therefore, not adopted. In Kansas and Minnesota the amendment proposed by the legislature excludes from the Recall election the selection of a candidate to fill the vacancy if the Recall is successful. This eliminates only one of the many objections, but through this manner of sugar-coating the measure which is proposed as a remedy, many legislators

in the above states have been deceived into withdrawing their opposition to the Judicial Recall. In Colorado a case is pending in the Supreme Court questioning the regularity of the submission to the people of both amendments; but until that case is decided, both the Recall of Judges and of Judicial Decisions are in force in that state.

In many of the 40 or more state legislatures which have just adjourned, measures for constitutional amendments providing for the Judicial Recall were presented, and in some of them, while not successful, received surprisingly strong support. In North Dakota, after most strenuous contest, the Recall of Judges lost by one vote.

Minnesota is, thus, the first state having any of its territory east of the Mississippi River to adopt any form of the Judicial Recall, even by the vote of its legislature. The movement for its adoption seems to be one originating upon the Pacific Coast and to be spreading east.

It is a mistake, however, to assume that the agitation has not become a serious one east of the Mississippi. It has already shown up strong, although without, as yet, sufficient strength for adoption, in the legislatures of Wisconsin, Illinois, Ohio and other states. In the recent Massachusetts legislature, a measure was presented and strongly urged for a constitutional amendment authorizing the Recall of Judicial Decisions "in all cases when a law otherwise duly enacted by the legislative authority of the commonwealth shall be held by the Supreme Judicial Court to be in violation of the constitution." In April last, there was introduced in the Congress a joint resolution proposing to the states the election of all federal judges by vote of the people, with a tenure of 12 years, and providing for the recall of all judges, both of the supreme court and inferior courts, at any general election at which presidential electors shall be chosen. A senate joint resolution was introduced in December, 1912, in the Congress, proposing a constitutional amendment providing that any decision of the Federal Supreme Court declaring unconstitutional an act of the Congress, may be submitted by the Congress to the electors, and that by vote of a majority of congressional districts and of the states, such act should, notwithstanding the decision of the Supreme Court, become a law. These measures have not met any considerable

support, but it is significant that such measures as these should be even proposed and that they would find active supporters.

Provisions for Judicial Recall Adopted in Various States

The following synopsis shows the Judicial Recall measures already adopted in certain states. In states not here mentioned it has not been passed by the legislature nor adopted by the people.

OREGON.—Recall of Judges. Constitutional amendment, adopted in 1908 under initiative by the people. Authorizes recall and new election to fill vacancy at the same time on petition not to exceed 25 per cent of qualified voters. Allows judge to resign within five days. In case of failure to resign, recall election within 20 days after filing petition. Charges of not to exceed 200 words in length must be included in petition and placed on ballot, and defense of same length allowed on ballot. Grounds for recall and nature of statement of same not specified. It is now generally assumed that constitutional provision not self-executing, and requires facilitating legislation. Facilitating act of legislature in 1913 passed but vetoed by Governor. No successful instance of judicial recall in this state. See Oregon Constitution, Article II, Sec. 18.

CALIFORNIA.—Recall of Judges. Constitutional amendment adopted in 1911. Constitutional provision is made self-executing, but allows further legislation. Provision for charges and defense same as in Oregon, except 300-word defense allowed. Recall election includes selection of successor. Majority of votes actually cast decides, as in Oregon. Recall petition must be signed by 12 per cent of number of votes cast at last election; provided that in the case of any state officer elected in any political subdivision of the state, the percentage is 20 per cent, and in case of officer elected from the state at large, signatures must include 1 per cent of the number of votes cast at the last election in each of five counties. The only successful judicial recalls which have taken place in the United States, so far as we have learned, is that of the recent case of Judge Weller, in San Francisco, and one justice of the peace in Arizona. See California Constitution, Article 23.

COLORADO.—Recall of Judges and Recall of Judicial Decisions. Constitutional amendments on initiative of people adopted gen-

eral election 1912. Recall of Judges same as in California, except 25 per cent of number of votes cast at election required on recall petition. Recall of Judicial Decisions provides that before a supreme court decision declaring a statute or certain city charter provisions unconstitutional shall be enforced, it may be, on petition of 5 per cent of qualified electors of the state or city, as the case may be, referred to the electors of the state or city; and if a majority of the votes cast is against the decision, the decision is recalled and the law stands. Thus there is established, in Colorado, a sort of local option as to the control of the final judgments of the highest court of the state. See Colorado Constitution, New Article XXI, and amendment to Section 1, Article VI. A case questioning the regularity of the submission of these amendments, and therefore, their validity, is now pending in the State Supreme Court.

ARIZONA.—Recall of Judges. Arizona Constitutional Convention, December 9, 1910, proposed a constitution which included provision for recall of all public officers, including the judiciary. Allowed recall from any office by qualified electors of any electoral districts, which electoral district may comprise the entire state. Recall petition must be signed by 25 per cent of the number of votes cast at last preceding general election for the office in question. (Section 1, Article VIII, Constitution of 1910.) August 15, 1911, this constitution disapproved by President Taft. (See Veto Message, House Document 106, 62d Congress, 1st session.) By joint resolution of August 21, 1911, the Congress provided as a condition for admission that said Section 1 of Article VIII of the proposed constitution should be amended by vote of the people by inserting the words "except members of the judiciary." (See Joint Resolution No. 8, of August 21, 1911.) By special election December 12, 1912, the amendment eliminating the recall of the judiciary was passed by vote of 14,963 in favor, and 1980 votes against. After admission to statehood, the first legislature of Arizona, on April 26, 1912, proposed a constitutional amendment changing Section 1 of Article VIII by eliminating the exception proposed by Congress and adopted by the people as a condition to being admitted to statehood. On November 5, 1912, at a special election, this amendment was adopted by 16,272 votes in favor and 3705 votes against. (See Arizona Constitution, Section 1, Article

VIII, as thus amended.) There has, as yet, been no attempt at recall in Arizona, except one justice of the peace was recalled in a small precinct in Cochise County by less than a dozen votes; and there is now pending a recall against Judge John C. Phillips of Maricopa County, for directing a verdict in a personal injury case, under a petition circulated by the labor unions of Phoenix and filed while Judge Phillips had yet under advisement a motion for a new trial.

NEVADA.—Recall of Judges. Constitutional amendment proposed by legislature in 1911; adopted general election 1912. General provisions same as in Oregon. Facilitating legislation adopted in 1913. See Nevada Session Laws, Ch. 258, Laws 1913 and Constitution, Article II, Section 9.

ARKANSAS.—Recall of Judges. Constitutional amendment, initiated by people under the initiative and referendum, passed at the 1912 election. Supreme Court held not properly submitted and, therefore, never adopted. Under state constitution only three amendments can be submitted at one election. The 1913 legislature submitted three amendments on other subjects. Accordingly, no recall amendment can be passed for at least two years.

KANSAS.—Recall of Judges. The legislature of 1913 proposed amendment for adoption by the people at general election in 1914. It provides for recall election without selection of candidate to fill vacancy. Recall petition must be signed by 10 per cent of number of votes cast at last election in case of state officers, 15 per cent in case the electoral division is less than a state and greater than a county, and 25 per cent where it is a county or lesser division. See Kansas Laws 1913, Ch. 336.

MINNESOTA.—Recall of Judges. Constitutional amendment proposed by legislature of 1913 for submission at general election of 1914. Gives power to the legislature to provide recall of elective officers, including judges. Recall petition must be signed by not less than 20 per cent and not more than 30 per cent of number of votes cast for governor in the electoral division at last preceding election. Judge may resign in five days after filing petition; otherwise, election in 25 days. Question is confined to recall. No election of successor. 200-word charge and 200-word defense. No petition to be filed until judge has held office for six months nor within 60 days of any decision com-

plained of. Recalled judge not eligible for re-election. See Minnesota Laws 1913, Ch. 593.

American Political Science Review. 6: 41-53. February, 1912.

Operation of the Recall in Oregon. James D. Barnett.

While the constitutional amendment was yet before the people for adoption, the recall of a member of the city council of Portland was discussed, to be attempted if the amendment should be adopted. But apparently the first serious attempt to recall an officer was made in Medford the next month after the amendment was adopted. This was blocked by a decision of the circuit court holding that the amendment is not operative without additional legislation. The next year the mayor of Junction City, and the mayor and all the councilmen of Estacata were recalled. In the same year the recall of the mayor and three members of the city council of Union was prevented only by these officers' going "through a regular routine of resigning and electing themselves to other offices. In 1910 the mayor of Ashland was subjected to a recall election, but the election resulted in his favor. In 1911 a member of the city council of Portland was recalled by the voters of his ward. Thus only four recall elections have actually been held, but in three of those the officers have been recalled. If the affair at Union is included as practically a recall, the officers have been deposed in four out of five instances. All of the officers have been municipal officers. All of the municipalities except Portland are small, the largest containing about five thousand people, and the smallest about four hundred. Many more or less serious attempts have been made in other cases to recall officers, including mayors, members of city councils, a member of a board of education, an assessor, county commissioners, a district attorney, a circuit judge, a municipal judge—the list is necessarily incomplete; but for one reason or another elections in these cases have not resulted. Further, mere threats are often made to recall officers, which nobody takes seriously."

Neither in the cases in which the officers were recalled

nor in that in which the officer was sustained in the election do the reasons for the demand as stated in the recall petitions disclose all the motives nor always the chief motive for the demand. In one case where it was charged in the petition that the officer was inefficient, immoral, untruthful, and arbitrary in the exercise of his authority, a motive which was influential at least to some extent was the hostility of certain property owners caused by the officer's action in opening streets which they had illegally closed. In one of the bitterest campaigns the petition asserted that the officials had managed the affairs of the city in an unsatisfactory manner, illegally diverted public funds, repudiated the city debt, etc. But the real cause of the recall movement was simply a factional fight waged by two banks and their respective supporters which had divided the city against itself ever since the second bank was organized, and which ceased later only with the merger of the two banks. When the petition charged a mayor with incompetency, improper expenditure for street improvements, unwarranted removal of a city employee, and favoritism in committee appointments, the real ground of the agitation seems to have been opposition to his progressive policy in regard to public improvements. Where the petition stated simply that a councilman did not "faithfully and efficiently represent" the interests of his ward and city, the motives behind the recall were various. The officer had been inconsiderate in dealing with some of his constituents who desired his influence in securing certain action by the council. He had fathered an ordinance deemed by the labor unions prejudicial to their interests, and he was opposed by their adherents on this account. Their candidate won in the recall election. Further, the councilman had advocated the location of a sewer outlet in a certain locality and had thus aroused the opposition of some property owners. One of these was a candidate at the recall election. The councilman had also incurred the enmity of a corporation attorney by charging the latter with an attempt to bribe him to drop some legislation detrimental to the interests of the company. The attorney was very active against the officer in the recall campaign. It was also claimed that

several corporations which had suffered from legislation originating with this officer were partly responsible for his defeat. In another case where unsatisfactory administration, diversion of public funds, needless expenditures, abuse of the emergency clause in the enactment of ordinances, impairment of the public credit, etc., were alleged in the petition as the reasons for demanding the recall, the movement was really the outcome of struggle between those who opposed and those who favored the stringent enforcement of the prohibition law. The officers attacked represented the "temperance" ticket which had won at the previous election.

It appears that some of the charges stated in the petitions in these cases could be substantiated but that others could not. On the whole it seems that the recall action was not justified in more than one or two of these cases. However, it is going too far to conclude, as has been maintained here to some extent, that this experience with the recall has shown it to be merely an instrument of personal or factional spite.

It has been objected that the law does not limit the statement of reasons for the demand of the recall to "justifiable" reasons, and that it thus opens the way for grave abuse. Some change here might well enough be made, but how effective any such limitation as to reasons would be is doubtful, since, in practice, as has been observed, the real motives back of the recall movement may not be mentioned along with the "justifiable" reasons in the petition.

As a check upon the abuses of the recall, some of its leading advocates have considered that it might be well to amend the law to increase the percentage of signatures now required for the filing of petitions. But a more rational change would be to reform the methods now employed to secure the signatures. Although it is probably true that people do not sign recall petitions thrust before them on the streets and elsewhere as readily as they do other kinds of petitions, nevertheless under the present system there is great probability that accommodating persons will by their signatures aid a movement for the merits of which they care absolutely nothing. For this reason, and also as a

safeguard against fraud—forgery of signatures to recall petitions has been charged—it should be required that the petitions be left at some public office for signature. "The only possible excuse for the recall is that it should be spontaneous and that each signer should be sufficiently interested to go to some public office and sign the petition—not wait to have it shoved into his hand with a 'sign here' from a 5-cents-a-name getter."

The expenses of the recall elections—both to the public and to the candidates—have doubtless had some effect in discouraging recall movements. The six months' exemption provision has been another check, and possibly some danger of action for libel—this was threatened in one case where the charges in the petition were very grave—has discouraged the circulation of petitions in some cases. Fear of the failure of the recall movement under the particular circumstances caused in one case a lack of suitable candidates against the official attacked, and further action was hence delayed. Where the offense has been a legislative act, the possibility of invoking the referendum has doubtless diminished the demands for recall to some extent. "The good sense of the electors" is of course the chief reliance of the advocates of this instrument of government against any danger from its unwarranted use.

Opinions widely differ as to the effects of the institution upon the conduct of officers. On the one hand it is maintained that the mere existence of the law holds a discreet official "to a definite sense of his responsibility of his duty." On the other hand it is said that "the recall . . . exerts no corrective influence over officials that the laws against official corruption and the controlling power of public sentiment do not." In fact, it seems that at least on a few occasions the serious threat of a recall has prevented or has helped to prevent some official "sins of commission"—granting an obnoxious franchise establishing a "restricted district." It may be, of course, that much political corruption has been prevented by a deterrent influence of the recall law. But, on the other hand, the possibility of a recall has probably caused at least some "sins of omission." It is thought that the assessors in many instances have failed to enforce the law fully for fear of a recall.

AFFIRMATIVE DISCUSSION

Annals of the American Academy. 43: 17-31. September, 1912.

Initiative, Referendum and Recall, George W. Guthrie.

There can be no order and stability in any community, no civilization worthy of the name, unless the law gives expression to the ideals and collective will of the people, and its administration commands their respect.

Because the science of government is constantly being developed, because the rapid change of our population from rural to urban conditions has imposed new duties and responsibilities on our government, the meeting of which in an adequate manner is essential to the safety and well-being of the people, and because, in the face of this, it is, under our political system of party government, becoming more and more difficult to secure the changes in legislation and administration which the new conditions call for and the needs of the people demand, impartial and thoughtful men have come to a recognition of the fact that there must be some new method which will better enable the people to declare their will, and more surely and expeditiously enforce obedience to it, than is possible now.

Ultra-conservative men say that our present system of party government affords adequate facilities for all purposes; but that opinion ignores three essential factors, which must not be ignored in the consideration of the question.

In the first place, citizens, under our present system, divide themselves into parties according to their views on one or two issues which they regard as "paramount." These divisions, however, are necessarily on broad lines: men who differ radically on many questions act together to secure

the adoption of the policies on which they agree. When conditions were simple, this system proved practically satisfactory; but as conditions become more complex, and the points of disagreement more important and those of agreement comparatively less important, these divisions become less satisfactory. More and more, citizens are beginning to feel that, unless some system be provided by which the voters can give expression to their individual wishes on questions concerning which there is disagreement within the party, party associations cannot be maintained. The division of the people into two, or even three, great national parties, separated by clear and distinct lines, will soon be impossible, unless some method is provided through which intelligent men may continue their party associations without surrendering their own intelligence and conscience on questions on which they often have deep convictions. The division of the electorate into numerous small parties, rendering government through parties impossible except by bargains and trades, is not to be desired; yet, unless some method for the expression of individual differences under our present system is provided, it will be unavoidable.

In the second place, more and greater changes now take place, more and greater emergencies arise, in a year than formerly happened in a generation. Questions affecting the safety and well-being of the people arise from time to time, which should be met promptly. The delays which can be interposed when relief is sought through the ordinary course of party action, and the difficulties always met with in any attempt to fix responsibility for the passage or defeat of any measure affecting public interests, have and will cause great and unnecessary suffering and loss. Bills backed by public sentiment, but objectionable to controlling interests, are seldom openly defeated. They are smothered in the committee or left on the calendar of undisposed-of-bills. At the last session of the Pennsylvania Legislature, the speaker refused to permit a roll-call on a certain public measure. When criticised for this action, he was reported in a public interview as saying that there was a clear majority of the house against the bill, and that the only effect of a roll-call would have been to put

members on record and thereby cause some of them unnecessary trouble and expense in securing re-election. At the last Republican State Convention, a member objected to a resolution requiring all Republican candidates to commit themselves in writing to the measures pledged in the platform, because to do so would ensure the defeat of some of them.

Under such a system, how is it possible for the people to act intelligently?

They are not to be permitted to know the views of legislative candidates before election or how they vote when elected.

In the third place, in many instances an evil is accomplished by the mere enactment of a law, which cannot be rectified by its repeal. A franchise once granted becomes a contract and is not repealed by a repeal of the act granting it. A payment of public money under an appropriation legally made cannot be recovered. A general law, no matter how objectionable, becomes operative at once; it may be repealed at the next session, but even if the obstacles in the way of a repeal are overcome and the repeal secured at the next session, here in Pennsylvania the people must suffer under it for two years. A beneficial law defeated at one session may be enacted two years later; but in the interim the people must do without the relief. No matter how the evil measure was passed or the beneficial one defeated, whether it was ignorance, influence or direct corruption that accomplished it, the people are the sufferers, and under our present system must continue to suffer for two years at least.

Through the operation of our system of party government, there has been developed in different municipalities and states, a body, commonly called "the boss and the machine," which, although unknown to the law, actually controls, more or less completely, the powers of both the executive and legislative departments. The framers of our constitution provided for separate and independent departments of government, each to exercise for itself the powers committed to it, and at the same time be a check upon all the others. The sole purpose of this was to pre-

vent any one department becoming so powerful as to dominate and control the others, and so endanger the liberties of the people.

This is still the theory of our government. The "boss and machine," however, is a fact.

The "boss," chosen not by the whole people but by a mere faction, holding an office not known to the law, and exercising powers never legally conferred upon him, nevertheless, except in short periods of political revolution, controls both the executive and legislative departments of the municipality or state over which he rules, and in some instances, his malign influence has extended even into the judicial department.

Washington foresaw the possibility of such a condition arising under our system of party government; and in his "farewell address" warned the people that an excess of party spirit would have a tendency "to put in the place of the delegated will of the nation, the will of a party; often a small, but artful and enterprising minority;" and would be "likely, in the course of time and things, to become potent engines by which cunning, ambitious and unprincipled men will be enabled to subvert the power of the people and to usurp for themselves the reins of government."

Do we not now confront this very condition?

Justice Hughes, in describing the "city boss," says that "in the full play of his influence he becomes mayor, common council, commissioner of public works, head of the police department, as well as sheriff and district attorney." The accuracy of this description has never been challenged: *mutatis mutandi*, it also accurately describes the "state boss."

No one questions the existence and power of the "boss" in our system. Wherever he exists, his personality is so well known that no one familiar with public affairs ever hesitates in naming him. Yet he holds no legal office, and exercises no lawful power. Were the purposes of the "boss" always honest and his methods pure, the system would still be a constant menace to liberty and good government.

That the powers of a single department of government should be controlled by an agency not known to the law and not selected by or accountable to the whole people, but only to a faction of a party, is incompatible with any theory of real representative government: but the control of the powers of two departments by a single agency of this character is destructive of our system of representative government, and overthrows the just balance of powers which is essential to its maintenance.

How much greater the evil—how much more serious the danger—when all three departments of government become subject to such control.

But the "boss" system, whatever pretenses it may make in the beginning, never has and never will remain honest either in methods or purposes. The opportunities which it presents for improper and illegal practices have in the end always and everywhere been utilized.

It is generally through the "boss and his machine" that the criminal and vicious classes secure the immunity required for the profitable prosecution of their occupations, paying therefor in money and in votes. So, too, it is to the "boss" that the "interests" go to secure the executive and legislative favors which they desire.

It is true that when the "boss" is hostile, or when his "machine" is not in perfect working order, direct bribery is sometimes resorted to. This, however, is dangerous to all concerned and is not a popular method.

The "boss" holds no office and can receive favors without subjecting either himself or the giver to the penalties of the criminal law.

Two other factors have been developed which tend to impair the balance of the system established by the constitution. One is the undue influence of the executive department, through the patronage which has from time to time been committed to it; the other is the number and vast wealth of business interests, which may be peculiarly and specially benefited or injured by new legislation, and which are therefore interested to defeat or promote it, without regard to the effect on the general public whether for good or evil.

It is true that sovereignty still remains with the people, and that by long and persistent agitation they can in the end overcome all these obstacles and secure from the government that which they need and desire. But it is only by great and long-continued effort, and often by great expense which those concerned can ill afford, that it can be accomplished; and even then it may require the breaking of political associations to which the people are much attached and the defeat of other measures in which they are interested only in a comparatively less degree. In view of the rapid developments constantly occurring in matters which intimately affect our daily life, and of the rapid changes in conditions due to the growth of congested centers, more developments and greater changes taking place in a year now than in a generation before, these long delays in matters of vital importance impose a great burden of loss and suffering on the people and should not be continued if possibly avoidable.

Under our present system the practical difficulties in the way of any movement to secure legislation opposed by the "boss" are almost insurmountable. It generally requires either a political revolution or an insurrection so strong as to extort from his fears that which he will not concede to justice. Such legislation is usually smothered in committees, or left on the calendar of bills undisposed of, and it is difficult, if not impossible, to fix responsibility. And when the responsibility has been fixed, the power of the "boss" to protect the delinquent, either by securing his re-election or providing for him in some other way, is very great.

The direct primaries are weakening this power; but when we contemplate the acknowledged expenditure this year of over \$110,000 to control (?) the primary election in Allegheny county alone, and the expenditure of over \$280,000 at the municipal election of 1911 in the same county, we realize how potent are the influences against which the people have to contend in any struggle with the machinery of a majority party.

No remedy has even been suggested except the "initiative, referendum and recall," and as long as the opponents of these measures fail to suggest any other, we are justified

in questioning either their good faith or their appreciation of the evils of which the people most justly complain.

To assert that, in such a government as ours, any procedure which merely provides a sure and convenient method for the ascertainment and enforcement of the will of the people, who are sovereign, is revolutionary, is simply an absurd misuse of words.

Nor are the systems proposed new in anything except in the mode provided for their application. From the beginning of this government, constitutions have been adopted and amended by direct legislation, and in different states various matters of legislation, more or less numerous, have been left to the decision of the voters. There is, therefore, nothing even new in the principle involved in these measures.

In the Articles of Confederation, and in the first Constitution of Pennsylvania (1776), the "recall" was provided for. It was dropped subsequently, not because it was radical or, revolutionary, but because it was believed that the short term of office would sufficiently protect the people from abuse of power. The new terms of one year for the state house of representatives and two years for the national, for example, seemed to the framers very short when contrasted with the parliamentary term of seven years with which they were familiar. The shortness of the term, in most cases the term would expire before it could be put in operation, and the almost entire absence of any public means for spreading information, made the "recall" generally unnecessary and always impractical.

But all this has changed.

Terms of office have been greatly lengthened. Means of public and private intercourse have been developed so that every morning we have spread before us the news of the world, and a man sitting in his office in one city can talk with another in any city east of the Rocky Mountains.

Why, then, should the people be required to suffer for two, four or perhaps six years for relief from a public servant whom they had trusted, but who proved incompetent, unfaithful, or corrupt, or from the consequences of the improper defeat or passage of some legislative measure?

Of course, in cases in which actual corruption can be

proved, a corrupt official may be removed by impeachment. This is the theory; but such proceedings are so cumbersome, slow and expensive, and are so apt to be disposed of, not according to justice, but according to political interests and influence, that they are practically useless. Moreover, in the great betrayals of public interest, actual corruption, even if it exists, cannot be proved. But there is not even this pretense of protection for the people from the consequences of legislative wrong. The impeachment of a corrupt legislator does not impair the validity of a law passed by his corrupt vote.

It is no answer to say that the people themselves are to blame for electing officials who prove false or incompetent, and therefore should suffer the consequences whatever they may be. No business man or combination of business men act on any such theory in the conduct of their private affairs. They claim the right to remove at once any officer or agent who proves unsatisfactory for any reason. A conspicuous example of this is contained in the revised draft of the Aldrich bill providing for a national reserve association, recommended by the Monetary Commission. This bill provides that the governor of the association, although to be appointed by the President of the United States, may be removed at any time by a two-thirds vote of the directors.

In theory the "recall" is right. Can the people, entrusted with the power to appoint, be safely entrusted with power to remove? The question answers itself.

It is asserted that the "recall" would lead to continual public agitation which would affect business. This objection is not tenable either in theory or in fact.

This is a republic; and whatever agitation is necessary to secure good government for the people, must be borne as essential to its maintenance. The American people, however, are as a whole patient and conservative, not mercurial. We have from time to time exhibitions of great popular excitement; but in the end the decision of the people is reached soberly and deliberately; and when made, no matter how great and bitter the previous agitation may have

appeared, nor how serious the disappointment of the defeated may be, it is accepted peaceably.

Even the election of a President by what the majority at the time believed to be fraudulent means, though bitterly resented, was submitted to without any popular disturbance whatever. There was no legal remedy; and the overwhelming popular sentiment in favor of order made any other course impossible.

In 1907, in the midst of profound political peace, the business of this country was precipitated into one of the most severe and protracted panics we have ever known; and now in the midst of the most bitter political contest of a generation, business is daily improving and prospects growing brighter.

This specter of business disaster from necessary political activity should therefore be laid to rest.

Special interests dependent upon governmental favors may be made uneasy when the power of the faction to which they look is threatened. But the life of the country moves on peacefully as long as justice prevails; nothing will disturb it but intrenched wrong in public office.

In Great Britain they have a "true" representative government. Parliament is sovereign. It has removed kings and changed the succession of the crown; and it can prolong its own term. In all questions, its will is supreme; its acts can only be set aside by revolution. Executive power, moreover, belongs to what is in fact really a parliamentary committee. Yet for generations, no parliament has served out the term for which it was elected; from time to time—frequently at very short intervals—it is voluntarily dissolved in order to refer some important question to the decision of the people. Indeed, it is the rule to ascertain the will of the constituencies by a dissolution when an important new measure is introduced. In the twenty-three years, from the Congress of Berlin to the South African war, including the period of the Egyptian war, parliament was dissolved eight times in order to ascertain by a "referendum" the will of the people on important foreign and domestic measures, in-

cluding foreign wars, the Irish land act, Irish home rule, the corrupt practice act, the franchise act, the redistribution of seats, and public education. Within the last few years there were two dissolutions in quick succession in order to ascertain the will of the people on a new system of land taxation.

It must be remembered that the dissolution of parliament also involves a change of the executive. It is as though the President and congress were both subjected to a "recall" at one election.

The assertion that the "Initiative, Referendum and Recall" would substitute "mob rule and popular impulse" for the calm and impartial deliberation of representative bodies entirely ignores the facts. To secure the signatures of from ten to fifteen per cent of the voters of any municipality or state to a petition for an "initiative," or from fifteen to twenty per cent of a "referendum," will always require so much time, effort and expense, that it would be impossible on a mere popular impulse or sudden outbreak of temper. It could only be accomplished when backed by a deep conviction of justice.

All this will be followed by the public arguments, for or against the pending measure, which will inevitably occur during the campaign preceding the election; there would also be distributed to the people, under public supervision, the printed briefs prepared by its supporters and opponents. Only a mind distorted by idle fears or perverted by self-interest can see in this the slightest element of "mob rule," or even the shadow of danger of the adoption of improvident and ill-considered legislation by "popular impulse." Of course, there will always be a possibility of a mistake; but it will be an honest mistake, and it will not occur more frequently than such mistakes occur in representative bodies. On the other hand, action prejudicial to public interest is sometimes taken in representative bodies, not through mistake, but through improper or even corrupt influence. That danger will be reduced to a minimum under the new system.

Munsey. 47: 184-6. May, 1912.

Plain Talk About the Recall. Frank A. Munsey.

It is widely objected to the recall that in a community enjoying the privilege of discharging its elective officials at will there would be a continual turmoil because some faction would be busy all the time trying to get somebody recalled from office. The experience of commission-governed cities proves quite the contrary. The recall has seldom been invoked. The very fact that public officials know such a power to be in the hands of the people makes them the more concerned to shape their course with reference to gaining and holding the approval of the people.

Impeachment as a practical measure is a failure. It does not furnish the necessary relief. It has proved to be unworkable. As a result, it is rarely brought into use—never, indeed, except in cases of extreme disloyalty, or the grossest kind of unfitness. To be impeached, a man must be so much worse than the worst of our officials and public servants that impeachment finds almost no victims.

Moreover, impeachment damns a man for life. It brands him as so worthless or so vile a creature that he never has a chance again. It makes him an outcast beyond the pale of decency.

To be recalled, on the other hand, does not by any means utterly damn a man. It simply implies that he has failed to make good on the particular job on which he had been tried out.

There are many men liable to the recall, and who should properly be recalled; but there are very few to whom impeachment could be successfully applied, or wisely or humanely applied. The recall is a workable, practical, common-sense, just measure, while impeachment is an utter failure.

Outlook. 98: 697-8. July 29, 1911.

Recall in Texas.

The recall has been declared to be constitutional by the Supreme Court of Texas. About a year ago the policy of

the school board in Dallas was opposed to the formally and persistently expressed wishes of the parents of the city. A special election was held upon petition, at which those members of the board who were obstructing the wishes of the electorate were recalled and others chosen in their places. The offending superintendent of schools was dismissed; whereupon he and one of the recalled members sought an injunction to restrain the new board from discharging its duties, on the ground that the recall provision of the Dallas Charter was illegal and unconstitutional. The lower court refused to grant the injunction, a decision which the Supreme Court has just affirmed. In its opinion the Court said: "The people of the city of Dallas were invested with the sovereign power of the city by virtue of the grant of the charter to them, and the legislature has the power to grant to them the right to remove, by process of the recall provision, any officer who failed to discharge his duty in a manner satisfactory to the people of that city." The Texas Constitution provides that the legislature shall provide by law for the trial and removal from office of all officers of the state, the mode for which has not been provided in the Constitution. It was urged that the recall violates that provision because no trial is given. The Court answered that contention by saying that it applies specifically to "officers of the state," and holds that that expression has the same significance as "state officer." The members of the city board are not state officers, and that provision does not apply, and that relating to county officers was held not to be applicable, because members of the school board are not county officers. One of the justices dissented from the majority of the Court; he claimed that the recall provision was repugnant to Article IV, Section 4, of the Federal Constitution, which provides: "The United States shall guarantee to every state in this Union a republican form of government." In answer to this the majority quote Jefferson's definition of a republican form of government and apply it to the recall provision of the city charter. And in this connection the Court says with significance: "The policy of reserving to the people such power as the recall, the initiative, and referendum is a question for the people them-

selves in framing the government or for the legislature in the creation of municipal governments. It is not for the courts to decide that question. We are unable to see from our view-point how it can be that a larger measure of sovereignty committed to the people by this method of government and a more certain means of securing a proper representation in any way militates against its character as a republican form of government, and that it is thereby rendered in any sense obnoxious to the provisions of the Constitution of the United States."

Annals of the American Academy. 43: 3-16. September, 1912.

Functions of the Initiative, Referendum and Recall.

Jonathan Bourne, Jr.

Adoption of the recall is nothing more than the application of good business principles to government affairs. Every wise employer reserves the right to discharge an employee whenever the service rendered is unsatisfactory. The right of the employer to discharge his employee rests upon exactly the same basis as the right of the employee to quit. The principle is recognized throughout the business world, and it is put in practice by every large and successful corporation.

Consider the absurdity of the recognition of the right of a public officer to quit his position at any time and the denial of the right of his employers to discharge him. To assert the right in one instance and deny it in the other is to maintain a one-sided contract, the discrimination being against the whole people and in favor of the individual. If we can trust an individual to deal justly with the people when he considers tendering his resignation, we can also trust the people to deal justly with a public servant when they consider discharging him.

It is generally conceded that the American people have intelligence and honesty enough to be trusted with the power to select their public servants, even to choose a President of the United States. If it be granted that the people have intelligence enough to choose a President of the United States, no man can consistently contend that they have not

the intelligence to act wisely upon the question of discharging a state, county, or municipal officer. I think no one proposes, at present, to extend the recall to any federal official except those elected by the people of the several states.

All that is desired by the people of any state, county, or city is good service for the general welfare. They will never make a change unless satisfied that it will be a change for the better, hence they will never discharge a public servant unless convinced that his successor will be a more faithful and more efficient public official. They have a right to improve their government, or try to do so, if they see an opportunity, and this is the function of the recall. The interests of one individual must not stand in the way of better government.

Yale Review. 18: 206-9. August, 1909.

Recall. Margaret A. Schaffner.

The recent use of the recall in Los Angeles has brought into view an interesting parallelism in legislation. The charter provision of Los Angeles is so like the cantonal law of Schaffhausen for the recall of officials that it seems to have been modeled after the old Swiss system.

A comparison of the recall provision of Los Angeles with the cantonal law of Schaffhausen is of special interest because the measure which Los Angeles first secured in 1903¹ has served as a model for most of the subsequent enactments in this country,² while the present Schaffhausen law has a well authenticated history of revisions which seem to reach back to the time of the customary *Landsgemeinden*, when the people exercised the right of election and of recall directly under the customary law.

¹Los Angeles, Charter Amendment, California, Laws, 1903, pp. 574-5.

²Among recall provisions similar to the Los Angeles charter amendment may be cited the numerous provisions enacted in California since 1903; the Idaho law of 1907, pp. 368-60; the Iowa law of 1907, c. 48, sec. 18; the South Dakota law of 1907, c. 86; the Texas special laws of 1907, pp. 130-1, pp. 361-2 and 366, and pp. 621-2; the numerous charter amendments adopted under the Washington law of 1903, c. 186, and the recall law for cities of the second class enacted in Washington in 1907, c. 241, sec. 15. Among the more recent enactments may be cited the recall provision embodied in the charter adopted by Colorado Springs on May 11, 1909.

The salient features of the two laws are very similar. This is true not only as regards the scope of the recall, the procedure for the petition, the method of conducting the removal election, and the tenure of office of the newly-elected officials, but also there is a marked similarity in such minor details as the requirements for the contents of the petition, the qualifications of signers, the verification of signatures, the filing and the examination of the petition, the provisions for amendment in case of insufficiency, and the transmission of the petition to some responsible body authorized to call a removal election if the petition be found sufficient.

In a number of sections the parallelism is so marked that, when the proper substitutions for official terms are made, a substantially similar procedure is found in the Schaffhausen practice, followed for generations, and the Los Angeles method, seemingly so "unique" and "extraordinary."

And yet it were scarcely necessary to search the annals of old Schaffhausen nor to read her written laws to "discover" a political institution as old as the recall. Our own history furnishes an example of the practice when the delegates to the Continental Congress from Pennsylvania were recalled because they refused to sign the Declaration of Independence and other delegates were sent in their stead to carry out the imperative mandate of the people. Of still greater significance in the evolution of the recall is the parliamentary custom developed in England by which Parliament is dissolved and the members go back to the people and a new Parliament is formed. These various political institutions, some old in time, some seemingly new, seem to indicate that "representative government" may yet perfect a system under which "representatives" will really "represent" their constituents.

Outlook. 97: 375*-6.* February 25, 1911.

Recall in Seattle.

In an election which, though the most exciting the city has known for years, was quiet and orderly, the people of Seattle, on February 7, displaced Mayor Hiram G. Gill and

put in his place Mr. George W. Dilling. The issues of the election were stated at some length in the Outlook of February 11. In brief, they centered about charges of corruption, particularly in the police department, and of mismanagement of the lighting department. This was what is known as a recall election. In accordance with the law of the state a petition was filed requiring the voters of the city to decide whether they were dis-satisfied with Mayor Gill, and, if so, whom they should put in his place. The result was a victory for decency and good government. This is the second time the recall has been put into operation in a large American City. In the other case, that of Los Angeles, the Mayor withdrew before the ballots were cast, and even fled from the city. In this case the Mayor made great exertions to prevent the recall election from taking place. Like Los Angeles, Seattle indicates that it requires great provocation to render the Recall efficacious, and tends to disprove the statement that it provides an easy way for temporary passion to work injustice. It took a great deal of patient effort to bring this result about. What effect the votes of the women, who cast their ballots for the first time by virtue of the recently adopted suffrage amendment to the state Constitution, had upon the election is the subject of much surmise. Without their votes the election would have been very close. With them, the victory for good government was a certainty. The vote for Mr. Dilling was nearly 32,000, as against a less than 26,000 for Mr. Gill. The socialists swelled the vote against Mr. Gill, but not for Mr. Dilling. The total majority for a change in the city government exceeded ten thousand. The new Mayor, who at once took office, is regarded as a man of strong and upright character. His reputation is confirmed by a good record in business. He is not without public experience, as he has been a member of the state legislature.

National Conference for Good City Government. Proceedings, 1905: 104-6.

Municipal Progress in Los Angeles. Charles D. Willard.

The value of the recall as a permanent political institution cannot be determined by one experiment, but there are

again objections that were offered to the system before its addition which our two years of experience with it seems to have abolished. One was that it would discourage good men from seeking office. Two months after the recall election, the regular municipal nomination conventions were held and a larger percentage of good men entered the contest than at any time previously. Second, it was urged that frequent changes in the personnel of offices would result. But, as a matter of fact, it is pretty serious undertaking to secure the signatures of 25 per cent of the voters, each name witnessed and sworn to as the law provides. Moreover, there is the American sentiment of fair play to be reckoned with, which will protect the officer who means to do what is right, from an unjust attack.

NEGATIVE DISCUSSION

Atlantic Monthly. 108: 454-66. October, 1911.

Representative as Against Direct Government.

Samuel W. McCall.

In Oregon, it very rarely happens that there is an election in which the defeated candidate does not receive twenty-five per cent of the vote, and not infrequently he received nearly one-half of it. It would be a matter of no difficulty for him to initiate a Recall and practically to have the election over again; and so we should have perpetual warfare over the holding of office. That result has already clearly developed where the Recall is in force.

A public officer could not take the long view; he could not patiently study the problems that confronted him and carefully look into the conditions with which his office had placed him in close contact, but of which as a private citizen he could have only the most general knowledge. But he would need to be careful to do only those things which might be justified, not by close inspection, but upon the most superficial view. The office to which he has been elected gives him an elevated point of view which he did not have before, but he cannot avail himself of his wider range, because if he is no sooner in office than he must justify himself or retire in disgrace, he will be likely to do the thing most pleasing to the prevailing fancy and which will adapt itself most easily to the momentary condition of the public mind. His political interests will lead him to do the plausible and easily advertised thing, and it may be the thing that will really injure the people.

Whether such a government may be called popular or not, we should be likely always to have under it government of the

politician rather than government of the statesman. I have been criticised for using an expression similar to this, as if I had implied the converse; that we now always have government by the statesman; but such an inference can be drawn only by a careless or unscrupulous thinker. That we sometimes have government by the statesman is undeniable; but that our government is perfect, nobody would pretend. Edmund Burke asserted in effect the same thing at a time in his career when he was the most liberal, as he was always the most philosophical, of British statesmen. In appealing to his constituents for the right of a representative "to act upon a *very* enlarged view of things," and not to look merely to "the flash of the day," he declared:—

"When the popular member is narrowed in his ideas, and rendered timid in his proceedings, the service of the Crown will be the sole nursery of statesmen."

According to Burke's view the constant response to the popular mood would at least banish statesmen from the service of the people, if it did not limit it to the politicians.

It is not difficult to turn back to the supreme crises in American history, when its greatest figures were heroically struggling for what they saw to be for the interests of their country, and, if the policy of the Recall had been in force, to see how the whole course of history might have been changed, and how ambition and envy might have utilized a temporary unpopularity to terminate some splendid career.

As an illustration, take Lincoln in the earlier days of his administration. The disastrous defeats that the Union arms had suffered had been relieved only by slight successes. Lincoln scarcely had a friend even in his own Cabinet. Seward was willing to take him under guardianship and run the country for him; Stanton had written of the 'imbecility' of the administration; Chase was quite ready to be a candidate for the Presidency himself; the abolitionists were unsparing in their criticism; the great organs of public opinion were hostile to him; and there can be little doubt that, if a proceeding for Recall could have been had against him at the moment when he was enveloped in the clouds of unpopularity, the career of the greatest of Americans would have been brought to a disgraceful ending, with results to civilization which it is melancholy to contemplate.

But if we, the people, are so perfect that we can do no wrong even though we are guilty of no investigation, and can with wisdom assume directly to enact and enforce our laws, what reason is there why there should be any constitutional restraint upon our action, and why should we be hampered with statutes or constitutions even of our own making? Why not have the present entirely free from restraints imposed by the past? Why not permit us in our omnipotent wisdom to decide each case upon its own merits, considering only the inherent principles of abstract justice, which in our collective capacity, according to our flatterers, we must of course thoroughly understand?

The democracy of Athens at last attained to this altitude, where the sublimated 'composite citizen' stood forth unfettered and showed what he could really do. In the latter days of that city the action of her people became so direct that in a single abhorrent decree, disregarding what was left of their Constitution, they ordered six of their generals, among them the son of Pericles, to be executed; because, although victorious over their enemies in the days when Athenian victories were few, the success had not been achieved without cost.

Those who advocate the direct action of our great democracy might study with a good deal of profit the history of the little state to which I have just been referring. No more brilliant people ever existed than the Athenian people. They had a genius for government. The common man was able to 'think imperially.' Their great philosopher, Aristotle, could well speak of the Athenian as a political animal. They achieved a development in literature and art which probably has never since been reached. They could boast of orators and philosophers to which those of no other nation can be compared. We marvel when we consider the surviving proofs of their civilization. But when they did away with all restraints upon their direct action in the making and enforcement of laws, in administering justice and in regulating foreign affairs, their greatness was soon brought to an end, and they became the victims of the most odious tyranny to which any people

can be subjected, the tyranny that results from their own unrestrained and unbridled action.

It is said that the history of those distant times can present no useful precedent for our own guidance; but in what respect is human nature different today? Whatever new stars our telescopes may have discovered, whatever new inventions may have been brought to light, and whatever advances may have been made in scientific knowledge, the main springs of human action are substantially the same today that they were in the time of the Greeks. We should be rash indeed to assume that we shall succeed where they failed, and that we can disregard their experience with impunity.

American City. 4:275. June, 1911.

Menace of the Recall.

When the local W. C. T. U. and the liquor dealers join hands to secure the recall of a mayor it is pretty certain that one group or the other acted without carefully weighing the evidence. That is the great danger with the hair-trigger recall system that some of our cities are adopting—it is apt to go off prematurely. It will take only one or two recall elections for inadequate reasons to make men who have reputations to lose very careful how they risk them by accepting elective city offices. It has been hard enough in the past to get such men to be candidates for civic office; and what we need in this country is so to readjust our city governments as to attract rather than repel men of this type. It looks as though the commission system might accomplish this, but it will ultimately fail to do so if it is hampered with as easy a recall system as some cities have adopted. Even if a man successfully defends himself against a recall, the fact that a small disgruntled minority may make his term of office a continuous election performance will make the whole thing obnoxious to men who want to be administrators rather than politicians. Moreover this system will ultimately play into the hands of the politicians whose machines are always ready for serv-

ice, while the man they are trying to retire may have back of him no organization that can be relied upon in such an emergency. If we must have the recall it should be made so difficult that the machinery could be set in motion only by a great popular uprising against an official who had wantonly abused his trust. And for such emergencies we already have adequate legal recourse through prosecution and removal for malfeasance in office. The fact is that ninety per cent of those who think they want the recall haven't given the matter any serious thought, while the other ten per cent belong to the type to whom easy change appeals more strongly than careful selection. It will be a great day for the United States when its people stop using their city governments as play-things, and treat them as seriously and with as great respect as do the nations of Europe.

Proposed Reforms of the So-called Progressives.

James A. Tawney.

There is nothing more instructive in government, or nothing that proves more conclusively the fallacies of populism than experience. Let me read from an editorial of May 5th 1911, on the experience of the city of Tacoma, Washington, under their municipal recall:

"Those who revel in the excitement of a political campaign can wish for nothing more satisfying than the recall system as it is being operated in the city of Tacoma. On the 5th of April, an election was held to determine whether the Mayor should be ousted before the expiration of his term. None of the candidates received a majority of the votes cast and another election was held ten days later. This time the Mayor was deprived of his seat. Two weeks later, on the second of May, the required petition having been filed, the four city commissioners were hauled up for the ordeal. The election was not decisive, and another election has been ordered for the 16th of May. If this contest does not give a majority, the citizens will have to try again. When the commissionership has been disposed of, the requisite number of citizens may take it into their heads to petition for the recall of some other officers, if there are any others subject to the law.

"With office holders liable to be called into three or four campaigns during a single term, on the initiative of political machines whom they offend, how long will Tacoma or any other city that adopts a similar system be able to induce men of the right caliber to run for office? How long will the better class of voters take an interest in this kind of business and go to the polls to give expression to the honest sentiment of the majority whenever a handful of citizens compels an election?"

Under the municipal recall of Tacoma, therefore, there were four elections in less than two months. That ought to satisfy the most progressive. It also ought to afford all the political excitement necessary to satisfy all of the active politicians, and furnish almost permanent employment at regular campaign rates of pay, for all the political healers, and insure a thriving business for the "gin mills," especially in the "down-town wards," where most of the "Birds of Passage" vote.

But it is said by our junior senator, and other progressives, that the recall would never be used to recall a good officer or the good judge, but only to recall the bad ones. Who is to determine the good from the bad? The wild-eyed reformers whose uncontrolled zeal and unbalanced judgment may find executive or legislative officers too bad, because too conservative to suit his notions of reform legislation and administration, or the courts too rigid or technical in their interpretation of the law to serve the elastic purposes of his proposed reforms; whereupon in his righteous wrath he proceeds to stir the souls of his faithful followers to issue a recall of the governor or other state officer; members of the legislature, or the judge, in the name of progressive reforms?

The right to petition for the recall of an officer cannot be restricted to those alone who are supposed to be qualified to determine the good from the bad official. The exercise of this right cannot be limited to United States senators, college professors, lawyers, and doctors, to farmers and railroad officials, nor to wholesale and retail merchants. If the right is granted, it must be granted to all alike, to be exercised by any or all alike. The recall, therefore, if adopted, would instantly change the title of every elective officer from that of a fee simple title to that of a title at will. That is, where an elective officer who now has a fixed term established by the will of the majority, it is proposed to limit that term, dependent on the will of a small minority, who, for any reason or no reason, except perhaps political advantage or the gratification of personal malice, may petition for his recall.

Under this system, it will be seen, therefore, that the

misguided or malignant passions of an unimportant part of the community may accuse the most efficient elective officer, and by the use of groundless charges or published misrepresentations, create suspicion and distrust where formerly public confidence and faith existed; thus depriving the state of the services of an efficient and an upright executive officer or stainless judge. The recall is in the nature of a public indictment, returned, not upon evidence, but upon the will or the caprice of those who frame and sign it, charging no offense moral or legal; presented to a court that is bound by no rules except the rule of the majority; where the defendant is denied all presumptions in his favor and where he cannot answer any specific charge, for no specific charge is necessary to secure his conviction.

Our junior senator would say that the recall merely affords the elective officers an opportunity to go before the people again at another election.

"Yes," as it has been well said in respect to the recall of judges, "but how does he go? Does he go as a clean hearted, clear headed candidate, resting his claims upon his ability as a judge, or his honor as a man? Does he go with pride, gathered as the fruits of a useful life? Does he go as the embodiment of courage and patriotism? No, he goes with character dismantled by the attacks of those who would destroy him. He goes with his oath of office broken by the furtive whisperings of those who hold a grudge. He goes with his honor stained by the vulgar hand of the reckless accuser. He goes leaving his family at home in the shadow of disgrace. He goes impugned, impeached, outraged, and dishonored, not so much to regain the worthless office, but to restore his shattered fame and recover his foreclosed honor."

We can all remember when, only a few years ago, through a leading newspaper of the state, a member of the Minnesota bar arraigned the judges of our Supreme Court upon reckless, groundless, and malicious charges. If he and the newspaper referred to would then have had the right to have invoked the recall, they doubtless would have secured the requisite number of signers, and recalled the entire Supreme Court, thereby subjecting its members

to the humiliation and disgrace of defending themselves before the people against the baseless charges of their reckless accusers.

How do the advocates of the recall expect to improve, or even secure efficiency in the public service, under that policy? What elective office is there to which there is attached sufficient honor or salary, or both, to induce a man with the knowledge, ability, and character the position demands, to seek or even accept the office and thereby subject himself to the humiliation of the recall upon the groundless petition of a small percentage of those who may have opposed him for the place?

If it is the purpose of the advocates of the recall to lower the standard of efficiency in the public service, if they want men for public office not actuated by a high sense of public duty; men whose sole ambition is to be in the spot-light, or seek public office for the salary alone, they could not favor a law that would more completely accomplish their purpose than the recall.

In private employment it would not be possible to secure the services of a man competent for the position of president, general manager, or other important positions in any business organization where the employer reserved the right to, at will, and without cause, recall such officer in three or six months. In the Federal civil service and in the civil service in many of the states, the right of recall at will has been abandoned. This right under the civil service law and regulation can be exercised only upon a specific complaint in writing, setting forth all the charges, which must be supported by competent evidence under oath at a hearing where the employee is given an opportunity to confront his accusers and to answer and fully explain all the charges upon which his recall is asked. Under existing law, both state and national, the same rule applies with respect to judges and all other officers; that is, the people, through their representative, possess the right of recall in the form of impeachment. If the delinquency complained of is not an impeachable offense, then the cause for which his removal is desired must have existed before the people elected him, and with proper attention to their own interests prior

to the election, could have been ascertained. Even in such cases the people are not without a remedy. Such officer can be recalled when his term expires, which under our system is always short.

But, it is said, the initiative, referendum, and recall are progressive principles of government, and that those who oppose their adoption are necessarily reactionaries. This is the first time in the political history of our country when it has been claimed that principles of government in practical operation as part of the governmental system of many Nations more than a century ago and discarded because of their inefficiency in securing government by the rule of the majority, could be revived in the Twentieth Century and claimed to be progressive governmental principles. Yet, that is the situation today.

The initiative, referendum, and recall formed part of the governmental system of almost every republic that has ever existed. We, ourselves, lived under the recall prior to the adoption of our Federal Constitution. The first tentative draft of the Constitution of the United States presented to the Constitutional Convention in 1787 by Edmund Randolph of Virginia, contained a provision for the recall of members of Congress. When this provision was under discussion in that convention in connection with the election of members of Congress, Gerry of Massachusetts made a powerful argument in favor of a representative democracy as against a pure democracy. He did not fear the people, but he feared the pretended patriots. He said:

"The evils we experience flow from the excess of democracy. The people do not want (lack) virtue, but are the dupes of pretended patriots. In Massachusetts it had been fully confirmed by experience, that they (the people) are daily mislead into the most baneful measures and opinions by the false reports circulated by designing men, and which no one on the spot can refute."

Randolph, in speaking on the same subject, observed:

"That the general object was to provide a cure for the evils under which the United States labored; that in tracing these evils to their origin, every man had found it in the turbulence and follies of democracy; that some check, therefore, was to be sought for, against this tendency of our government."

Jefferson also said:

"Modern times have * * * discovered the only device by which the (equal) rights (of man) can be secured, to-wit; Government by the people, acting not in person, but by representatives chosen by themselves."

On June 12th, 1787, on motion of Mr. Pinckney, the provision for the recall of members of congress was unanimously stricken out of the proposed draft of the Federal Constitution.

In view of the fact that for ten years prior to that time the people of the United States had the recall under the Articles of Confederation, and in some of the States, and the experience of the people was known to the delegates in that constitutional convention, their unanimous action in rejecting it as one of the principles of our Federal and State government is very significant. It should cause our people to reflect seriously upon the question of now reviving and adopting as part of our system of government, a principle thus unanimously rejected by the founders of our Republic and rejected too in the light of ten years' experience under its operation.

**United States. 62d Congress, 2d Session. Senate Doc.
No. 238.**

Why Should We Change Our Form of Government?

Nicholas Murray Butler

We are told that the representative republic fails really and readily to reflect public opinion; that these representative institutions easily become the prey of the self-seeker, of the special interest, of the wirepuller, of the schemer, of the man who would use the public for his own personal advancement or enrichment; and that, therefore, they must be uprooted, overturned, and destroyed. We are told, in other words, that after not only 125 years of our own experience, but after 500 years of the experience of the Anglo-Saxon peoples, these representative institutions have failed, and that in the name of progress we must pass on to a direct democracy. We are told that we should begin by so shackling representative institutions that they must respond at once, mechanically, and with precision to the expressed wish or the expressed emotions of a majority of the voting population at any given instant, regardless of

the fundamental constitutional guarantees of civil and political liberty. We are told that if we do we shall restore government to a purely democratic form, that we shall make it responsive to the public will and to public opinion, and that every legitimate public and private interest will thereby be promoted. Surely this is an ambitious program.

Before we give our assent to it, however, suppose we examine for a moment the point of view and the contentions of those who are the mouthpieces of this revolutionary movement. We are justified in asking in the first place whether the attempt to substitute a direct democracy for a representative republic is progressive or reactionary. It is the history of all evolutionary processes that for particular purposes special organs are developed; for particular activities special instrumentalities are produced; and in developing any truly forward movement we proceed from the simple to the complex. In organic evolution the process is one away from the gelatinous and formless mass of the lower organisms to the exceedingly complex structure of the higher mammals. Obviously, then, it is at an earlier stage of evolution when one organism or instrumentality performs all functions, when one organism or instrumentality carries on government in all its forms, as well as those economic activities which result in providing clothing, shelter, and food. As we develop, however, and as we progress, we differentiate; we throw out feelers, as it were; we develop special organisms and instrumentalities, social as well as individual; and these divide among themselves the economic, industrial, and the governmental functions of the social unit. In this way we get a division of labor; in this way we get a specialization of function. A really progressive movement, therefore, is a movement toward differentiation, toward complexity, toward specialization of structure and function. The movement toward the perfecting of representative government is progressive; a movement away from representative government, a movement that would shackle and limit it, and that would appeal from representative institutions to direct democracy, is reactionary.

This is not a policy which makes for stable and consistent government. This is not a progressive policy. This is not a policy which will develop and strengthen the institutions that we have inherited and that we are seeking to apply to new conditions. This is not a policy which will bring support to the fundamental guaranties of civil and political liberty upon which our National Government rests.

But it may be urged, surely those fundamental guaranties are not questioned or doubted. I beg to assure you that every single one of them is questioned and doubted in this country, and questioned and doubted by no inconsiderable body of opinion, some of it not lacking in intelligence, very energetically represented in different parts of the United States. We may close our eyes to all this if we like. We may, with our consummate American hopefulness and optimism, say that it will turn out all right; perhaps it will; but the fact remains that there are some of us who believe that the fundamental guaranties which underlie our whole National Government and our national life can not be attacked, can not be denied, can not be made light of, without serious danger to our entire political fabric.

Should not the majority rule? If the majority wish to sweep away all the fundamental guaranties, should they not be permitted to do so? Is that not one of the risks that democratic government must run? Those who believe that we learn nothing in this world from human experience may, if they choose, answer those questions in the affirmative. Those who believe that nothing in this world is fixed or definite or a matter of principle, may answer those questions in the affirmative; but those who believe that we do move forward through the centuries by building upon and using the experience of those who have gone before; those who believe that out of the thousand or two thousand years of political life and activity of the western world there have come some principles which are certain and which abide, and some political guaranties that are vital to human welfare, they will answer those questions no; a thousand times no! Those who believe that we must build our institutions upon foundations that are not subject to continual revision and

reconstruction will answer no; a thousand times no! We point to the fundamental guaranties of the British and American Constitutions, and say that those are beyond the legitimate reach of any majority because they are established in the fundamental laws of human nature upon which all government and civilization and progress rest. Sweep them, away if you will; a majority may have that power, but with the power does not go the right. If they are swept away all government and all liberty go with them, and anarchy, in which might alone makes right and power alone gives place, will rise upon their ruins.

There is nothing new about all this. Aristotle pointed out that democracy has many points of resemblance with tyranny. It was he who first told us how democracy as well as a tyranny may become a despotism. It was he who first pointed out to us the likeness that there is between the demagogue in a democracy and the court favorite in a tyranny. If democracy is not to become a tyranny it must recognize and build upon those constitutional limitations and guaranties that are so precious to the individual citizen and that protect him in his life, his liberty, and his property. It is not in the power of any majority to sweep these away without sweeping away with them the whole fabric of the State in violent and destructive revolution. The other day, in turning over the pages of John C. Calhoun, I came upon a most extraordinary sentence which bears upon this very point. Almost a century ago Calhoun wrote these words:

"The government of the uncontrolled numerical majority is but the absolute and despotic form of popular government, just as the uncontrolled will of one man is monarchy."

(Control there must always be if there is to be liberty. That control is law, built in turn upon those limitations and guaranties which are our Constitution. It is just as easy for a majority to become a despot as for a monarch to become a tyrant; even a tyrant may be benevolent; even a democratic despotism may be malevolent.

Minneapolis Journal. October 12, 1911.

Recall Condemned. Archbishop Ireland.

But the worst is the recall. Stability and independence in office for a fixed period of time, are essential conditions of prudent planning and efficient execution. Liable to recall, the official is continuously watchful of public opinion which it is to his interest to placate and hold in check. No self-respecting citizen would accept office under such menacing conditions.

And, then, we must remember the peril to the public peace of the commonwealth. Fifteen or even 10 per cent of the number of voters at a preceding election—gathered in all probability from the defeated party, may force the recall and bring on the turmoil of a new electoral campaign.

But what if the official has proved himself unworthy of the trust reposed in him, incapable of serving the public interests? Our laws and constitutions provide the remedy: let him be impeached and judged by well-established and impartial courts.

Here is the remedy, without the evils of the recall. Under the recall, a fraction numerically small, giving no guarantee against prejudice or personal animosities, decides and punishes. The recall, as proposed by the present agitators, as, indeed, practised in a few communities, is fatal to public peace and to that security in office without which the public welfare cannot be subserved.

RECALL OF JUDGES

AFFIRMATIVE DISCUSSION

Illinois State Bar Association. Proceedings, 1912: 174-89.

Recall of Judges—A Judicial Affirmative.

R. M. Wanamaker.

Article 2, section 4, of the Federal Constitution reads: "The president, vice-president and all civil officers of the United States shall be removed from office on impeachment for a conviction of treason, bribery or other high crimes and misdemeanors."

The fathers knew full well how public officers of the past, both in America and in the mother lands, had abused their governmental powers, had been guilty of misconduct in office, had been unfaithful and derelict in their public trusts. They therefore wrote into the organic law the right to remove them all, and delegated the power to remove to the federal congress.

Remember another thing! They did not say "the legislative officers" shall be removed, they did not say "executive officers" shall be removed, they did not say "all civil officers excepting the judges," but they made it as broad and sweeping as official life.

They realized that the power to select good officers without the power to remove bad officers would be a fatal defect in any scheme of government.

But some one says, oh, that was impeachment! Well, now, do not let us quibble or juggle about forms and names. Let us deal with facts and substance.

I do not know that it makes any difference to the officer who is removed what you may call the procedure so long

as it results in his deserved removal; nor do I think it makes any difference to the public what you may denominate the procedure, whether impeachment, removal or recall, or what not, so long as it is practical and effective in bringing about removal in proper cases.

What I am insisting upon is that we recognize and realize the fact that the fathers attached no quality of infallibility to any public officer, not even judges, but wisely provided for the removal of all unfaithful officers.

The fathers of the Federal Constitution not only made provision for the removal of all public officers, but the fathers of the state constitutions likewise provided for the removal of public officers.

If the fathers were right in recognizing the transcendent importance of the right to remove in proper cases, and the legislative departments, upon whom that power has been conferred, have absolutely failed to act in the exercise of that power for half a century or more, is not that in itself sufficient to make the people pause and consider as to whether or not they should not recall that delegated power, and return to their own hands the right and power to recall public officers?

Can you, in your lifetime, recall a single instance of the impeachment of a judge by the legislature of Illinois? Can I, in my lifetime, remember a single instance of the impeachment of a judge by the Ohio legislature? Or has our poor mortal clay, with all its infirmities and weakness, become infallible and divine under the judicial ermine?

It would be impossible to itemize or classify all of the grievances against courts that have been mentioned and discussed. The most serious and important ones could well be embraced in some one of the following classes:

First. Too much delay.

Second. Too much expense.

Third. Too much uncertainty in the law.

Fourth. Too much idolatry of ancient precedent, the more ancient the more sacred. If the ancient condition has long since passed the precedent should go with it.

Fifth. Too many trials and appeals to the disadvantage

of the poor and the advantage of the rich. Litigation is an expensive luxury.

Sixth. Usurpation by courts of legislative right and power. No English king nor court though monarchical dares to hold an act of the English parliament unconstitutional. Our presidents, governors and courts, with utter abandon, are vetoing and nullifying intelligent, conscientious public opinion, crystalized in their regular and orderly forms of law. ,

Seventh. Too much regard for rule, too little for reason. Too much jugglery of the technical pleader, too little justice for the client.

Who is responsible for this? The judge, the court, chiefly the courts of last resort, whose decisions and judgments must be followed by the inferior courts else the judgments below will be forthwith reversed and another trial again had.

Now, what do the people propose to do? Simply propose to change the jury for removal from the legislature to the people themselves. Why, that is where we get all our juries from anyhow, from the plain people. They propose to say to the legislature—you have not been faithful in the exercise of the right to remove judges, you have absolutely ignored your duty in that respect, you have absolutely failed to use it or try to use it. We now propose to try the experiment of using it ourselves.

Have we ever changed juries before in the determination of important federal affairs? Let us examine the history of the selection of president. The fathers said in the constitution, if you were a citizen thirty-five years of age, you were qualified to be elected president, but you were not qualified to vote directly for president. That should be done by special jury, called the electoral college.

Though the written law is the same as when the college was first organized, the unwritten law has placed in the hands of the people the right to choose their president and that choice has been uniformly expressed and ratified by the members of the college even in the hot Hayes-Tilden contest of 1876.

This withdrawal of delegated power as to the selection

of president is just as noticeable in the election of United States senators. For years the people of the republic have been demanding the right to vote directly for the United States senators.

In many of the states, by the enactment of primary laws for the choice of United States senators by direct vote of the people, the legislatures of many of the states to-day, in the matter of the choice of senators, exercise the same function and no more, as the electoral college does in the choice of president.

Through it all we see a gradual but general withdrawal of delegated power from the electoral college, the congressional caucus, the political convention, in nominating and electing president, withdrawal of delegated power from the state legislatures in the nomination and election of United States senators, and, ere long, at least in the state governments, provision will be made for the withdrawal of the delegated power from the state legislature for the removal of judges and other public officers, and the same to be placed and exercised by the direct vote of the people themselves.

To-day there is no serious objection to the people exercising the right of removal as to legislative officers or executive officers for misconduct in office, but in many quarters, particularly the bench and the bar, there is a holy hostile horror against the exercise of the right to remove judges.

For the correction of the aforesaid grievances and complaints against judges through recall by popular vote under proper safeguards, I submit the following for your calm and careful consideration:

First. Every reasonable argument applicable to the removal of legislative and executive officers by popular vote applies equally to judicial officers. If not, what does not?

Second. As to the judiciary there is absolutely no check or balance from either of the other branches of the government. Legislative branches are a check on each other. The governor may check the legislature by veto. Courts may check the legislature and declare the law unconstitutional, or limit its application. The executive may be

checked and have his power cut off or limited by legislative act or judicial injunction.

Again, the legislative and executive branches are under the constant publicity of the press. Comparatively little is known about the judicial branch. Irresponsible, unchecked power is within a step from actual tyranny or a sinister subserviency to special interest.

Third. Courts are now exercising jurisdiction in this country exercised in no other civilized country in the world. I refer particularly to judgments declaring legislative acts contrary to state and federal constitutions and against sound public policy.

No English court for more than two hundred years has held an act of parliament unconstitutional. Such jurisdiction had not been exercised by any English court for seventy-five years prior to the formation of our Federal Constitution. The fathers never intended to confer such an extraordinary jurisdiction, then unknown, else they would have provided for it in the constitution. It is an usurpation of judicial power.

The exercise of this unwarranted and usurped governmental power against the public interest, against the public health, safety and life, has done more than any other single thing to arouse the present popular hostile feeling toward our courts of last resort.

Fourth. Our profession, bench and bar, is making too much of a fetish of the precedents of the stone age. We are always marching backward to find out what some lord or baron said in feudalistic days. The surgeon wants the latest, the newest, successful remedy. The manufacturer is looking and paying well for the latest, the newest, successful operation; the physician, the most improved effective medical remedy. The manufacturer is looking and paying well for the latest machine, saving cost of production, increasing quantity or quality of production, or both. In short, every department of life and activity, professional, productive and otherwise, except the bench and bar, are improving and economizing their service by the adoption of substantial practical reforms. Government alone drags behind, wasting time, money and rendering inefficient service; and in the government procession, it is hardly com-

plimentary to say, but no doubt the fact, that the judiciary is bringing up the rear of that belated procession.

But it is urged the judge should be independent. The judiciary should be independent in its legitimate field as legislatures and executives should be in their respective fields.

No trespassing is charged against executive, none is charged against the legislative, but the judicial branch is generally chargeable and justly so with trespassing on legislative right, executive power and the general welfare.

From 1902 until 1908 the respective supreme courts of the different states of this Union declared not less than 468 different statutes unconstitutional, and these were mainly statutes in the interest of social and industrial justice, public health, safety and life.

The judicial branch is not content to-day with merely interpreting and applying law as it is in every other civilized country in the world, but it is making law, amending law and nullifying law, under the mask of interpretation. So that the judiciary has become in fact and in law the supreme power over and above the legislature, over and above the executives, and even over and above the people.

When the provision of the Federal Constitution providing for the removal of public officers by impeachment was under debate, there was, in some quarters, a movement to except the president from such removal. I want to call attention to the suggestion made by Colonel Mason in that constitutional convention, when he said—"No point is of more importance than that the right of impeachment shall be continued. Shall any man be above justice? Above all, shall that man be above it who can commit the most extensive injustice?" I want to supplement this by what Mr. Gerry said. He urged the necessity of impeachment as applicable to the president in the following language: "A good magistrate will not fear it. A bad one ought to be kept in fear of it." He said he hoped the maxim would never be adopted here that the magistrate could do no wrong. The same argument is being used to-day to except the judiciary from recall by popular vote.

Isn't it a little peculiar that men who admit the people are qualified to nominate their own judges, who are quali-

fied to elect their own judges, most of them largely unknown, many of them wholly untried, that these same people should not be qualified after the judge has had a fair and reasonable opportunity to make good, to pass in judgment upon him and to wisely remove him for good and sufficient cause when he fails to efficiently and justly administer his trust? When we nominate him we pass in judgment upon his qualifications, when we elect him we pass in judgment upon his qualifications, and that is all that we do when we vote to remove him. It is almighty strange that the sovereign citizen has his lucid intervals only when he nominates and when he elects. Thereafter he becomes the part of the mob when he criticises and censures the court, or when he asks by petition to vote to remove the judge.

The old theory of elective officers as first provided for in the various state constitutions, especially in staid old New England, was for short official terms. Why? So that if the officer proved incapable, inefficient, corrupt or unrepresentative of the best thought and life of the people that when he came up for re-election he could be defeated. Frequent elections are but frequent opportunities to recall the judge. Judge Redfield, one of the most eminent jurists that ever sat on a bench in the state of Vermont or any other state, was elected and reelected annually for twenty-five consecutive times. It did not impair his usefulness, his inefficiency; his proper independence or his distinguished service upon the supreme court of the state of Vermont.

It would seem eminently fair that the men who select the judge; the men whom the judge is to serve, the men who pay the judge, should be the men to remove him for misconduct in office.

But you say the people will make mistakes. As the legislatures of the several states may be justly faulted for the nonuse of the power so the people will be faulted for abuses of the power. Well, the proof of the pudding is in the eating. The proof of the wisdom of any principle is in its practical application.

Oregon is the hotbed of American progressive thought and legislation. They have had a provision in their constitution authorizing the recall of judges for good cause for the past four years. During that time how many judges

have been recalled? Not a one. How many elections have been held to recall a judge? Not a one. A year ago an attempt was made to recall the trial judge, Judge Coke I believe, for laying down the law of murder too favorably for the defendant. The prosecutioners were greatly disappointed and very indignant. They started a petition for the recall of the judge, but it met with such general disfavor among the people that it was soon given up as a hopeless case. Another tribute to the good sense, the sound judgment and fair play of the American people.

There is no public office requiring any higher order of talent, tact and temperament than that of the trial judge. You cannot tell who will make the most serviceable and efficient judge, whether he be the office lawyer, the author lawyer, the trial lawyer, or a combination of each. There is absolutely no way of forecasting his efficiency except by giving him an actual trial on the bench. When he takes three days to try a case that should occupy but one, the public are losing one hundred dollars per day, the parties to the case probably as much more, and the cases to follow are being delayed and delayed because of the slowness and the dilatoriness of the judge in the administration of justice. If the newspapers give the proper publicity to his work on the bench, as above indicated, the cobblers and potterers will become known and can be recalled from the public service as they are now recalled, removed or discharged from private service. The recall election is the only way to reach such inefficient judges who permit the senseless, ridiculous pettifoggery in the trial of cases. It is one of the greatest hindrances and delays in the administration of justice. You cannot impeach a man for general inefficiency, but it is mighty important to the public to have the right to recall him.

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Nullifying the Law by Judicial Interpretation. Harrison
W. Smalley.

Aside from the conduct of bad or ignorant judges, the practice of judicial interpretation has developed very serious

evils, which are now beginning to make themselves felt. Four of these evils I wish to discuss at some length.

First. A fairly complete interpretation of an important statute can be obtained only after prolonged delay, and by the incurring of large expense.

Under our present system statutory construction is an incident of litigation. A question of interpretation can receive no official consideration until it arises in connection with a lawsuit, and no answer can be regarded as authoritative until the case is settled, not by the trial court, but by the highest court which is competent to pass upon it. Thus the slow-moving 'wheels of justice' delay the answer for a year or more,—usually more,—and the trials, appeals, and other supplementary proceedings are likely to postpone it for at least another year. And as in each case only the particular questions of construction necessarily involved in the controversy can properly be settled by the court, it frequently happens that a series of cases must be carried to final judgment before all the dubious points in one act, or even in one section of an act, can be fully cleared up. The expense of this litigation must be borne by some one, and is not an item to be ignored; but the more important phase of the matter is the delay. Many years must pass in which the people are in doubt as to the meaning of the statute; and if, as is often the case, it is an act which affects industrial interests, the prolonged uncertainty is a depressing factor in the business situation.

A capital illustration may be found in the Sherman Anti-Trust law. Passed by Congress in 1890, its meaning has not yet, after twenty years, been fully elucidated by the Supreme Court, although many cases have been tried under it. Some people are so discouraged by the failure of protracted litigation adequately to illuminate the act, that they are inclined to regard it as hopelessly obscure. President Taft, on the other hand, seems confident that the significance of the law has in the main been explained by judicial decisions. But, after all is said, the fact remains that under our present system twenty years have not sufficed for a full interpretation of a statute which was so important that a complete understanding of it should have been gained by the people of the country with the least possible delay. Any number of other

illustrations may be given, and some will be found in cases mentioned later in other connections.

Second. The existing practice compels our judges to assume an attitude on current economic and political questions.

As has been said, law-interpretation is law-making, and to the extent that judges are engaged in the exposition of statutes they are making laws for the people. They can no longer, therefore, maintain the position of arbiters, impartially applying rules of the law to the controversies of litigants. They have become legislators, engaged in the determination of governmental policy in matters of political and economic character.

A law is passed by the legislature for the regulation of corporations; but whether the regulation shall be mild or severe rests within wide limits, with the judges who interpret it. By one construction, they can nullify the law; by another, they can hold the corporations to a very strict account. And so it is necessary for judges to take an attitude, to reveal their personal convictions with reference to those 'problems of the day' which are the subject of so much important legislation. Almost inevitably their decisions disclose whether they are more in sympathy with the trusts, the financial 'interest' and those magnates popularly known as 'malefactors of great wealth,' who so loudly proclaim their 'vested interests' and 'property rights,' or with the great body of the people who urge in reply their claims of 'popular rights' and the 'public welfare.'

Similarly, judicial interpretation may well serve to indicate whether the judges sympathize with labor or with capital; whether they are in accord with movements for the alleviation of the working conditions of labor; and, in general, whether they favor those modern measures which aim at the elevation of the moral plane of competition and of business, and which do not refuse to make some sacrifice of the traditional rights of liberty, contract and property, when that is necessary in order to attain the end desired. Their decisions disclose these things because it is practically impossible for them to conceal their point of view in construing statutes dealing with such subjects.

But this necessity of descending from their judicial aloofness into the turmoil of present-day industrial and political struggles, is not a good thing from any point of view. It detracts from the dignity of the judges, and diminishes the respect which has so long been felt for our courts. Worst of all from their point of view, it exposes the judges to a new species of criticism,—a criticism not of their learning, nor of their judicial fairness, nor of their legal acumen, but of their economic policy. The wisdom and righteousness of their ideas in regard to great matters of public policy are being called in question, and from the effects of such criticism they should surely be protected, if any means of protection can be found. Moreover, as will presently appear, the entrance of the judges into the arena of industrial conflict is not helpful to the people in their efforts to solve the problems which perplex them.

Third. The existing practice removes carelessness in legislation.

It is the duty of a legislative body to give to the people laws which are as precise and clear as possible; but this is a duty which is often neglected, for legislators know that any confusion, ambiguity, or uncertainty in a statute will in the long run be cleared up by the courts, and this knowledge is one of the causes which are producing careless drafting of bills. Indeed it sometimes happens that legislators deliberately frame an act so that its meaning will not be clear, in order to throw on the courts the task of determining the question of policy involved, thereby avoiding the necessity of deciding it themselves.

An excellent illustration of this line of conduct was furnished by Congress in the passage of the Hepburn bill in 1906. Since that measure conferred on the Interstate Commerce Commission, power to fix railroad rates on complaint, it was of the utmost importance to define precisely the limits of that power. Should the Commission be allowed to regulate rates freely except as limited by constitutional restraints, or should more narrow restrictions be placed upon it? Unable to agree on this question, the differing factions in Congress at last concurred in a phrasing of the law which left

the matter unsettled. They adopted provisions which were capable of different interpretations, thereby compelling the courts to solve a legislative problem, to determine the nation's policy as to this important phase of the regulation of railway corporations. After what has been said as to the stately progress of judicial construction, need it be added that the problem is still unsolved?

Fourth. Frequently the legislative intent fails of recognition, and a statute is made to accomplish more or less than its authors purposed.

This is by all means the most serious result of the existing system of judicial interpretation. An act of legislation, however much demanded and needed by the , may totally fail to accomplish its end, or at least may become such a feeble instrument as to be altogether disappointing, while on the other hand, it may be applied to situations not contemplated at the time of its enactment. Such broadening of the scope of a statute is not common, but examples may be found, one of which is furnished by the Sherman Antitrust Law. That statute was designed to meet the evils of the industrial trusts, but seven years after its passage the Supreme Court ruled that it should also be applied to railway agreements and combinations.

In a large majority of cases, however, judicial construction produces an opposite result, and operates to restrict the application of statutes. In fact, the tendency in this direction is so strong that in many cases provisions of law are actually nullified by judicial interpretation,—provisions, that is, which the courts uphold as perfectly valid and constitutional, but upon which they place so peculiar a construction as to deprive them of all their vitality. Thus many a law admirably designed for the alleviation of some distressing social or economic ill gives little, if any, of the relief desired.

Before proceeding to enforce the seriousness of this evil by reference to important laws which have been weakened or nullified by the courts, we shall do well to pause and ask why our judges exhibit so marked a tendency to interpret statutes in this manner. Two potent reasons may be suggested.

While contemplating statutes, judges are thinking of legal technical ties, and not of the social conditions which called forth the law and which it was intended to ameliorate. Often judges have but an imperfect understanding of such conditions; but however complete or limited their knowledge may be, when called upon to give a judicial ruling on the statute, the technicalities of the law control their thoughts. This is a most natural result of the character of the law in which they have been trained.

A second reason why judicial interpretation so often proves fatal to the effectiveness of an act is to be found in the fact that, in principle and spirit, the system of law which prevails in this country, and which we inherited from England, is hostile to such legislation. For the regulation of industry invariably means the limitation of personal and property rights in commercial enterprise; while it is the traditional policy of the law to preserve such rights inviolate. The great body of the people clearly recognize that during the last century, and especially during the last generation, serious social and industrial evils have come into existence, to the injury of the general public; and they also plainly see that, to mitigate or destroy these evils, some distinct limitations must be placed on private rights of contract and property. But our system of law has not followed the course of industrial evolution, or at best has followed it with slow and reluctant step. In the main our system of law is still lingering in the eighteenth century. Indeed, it has been so little impressed by the evils with which the public are struggling that it has modified little, if at all, its ancient declaration in favor of the protection of private rights against interference.

If such is still the avowed purpose of the law, and the declared duty of the courts, it is but natural that judges who are trained in the law and filled with its spirit, would look askance at modern industrial legislation, and should think of it, not as a body of rules which should be applied with a firm hand, but as a body of rules all out of harmony with the traditions and ideals of the law,—designed, in fact, to invade those 'sacred rights' which, in the eyes of the law,

it is the very purpose of government to preserve. Looking at industrial legislation in this way, it is only natural that judges in their interpretations should tend both consciously and unconsciously to moderate the rigor of the statutes. It would hardly be humanly possible for them to give any more force than they felt absolutely obliged to give to statutes which, from their eighteenth century point of view, are fundamentally wrong. In brief, the legal and judicial bias against legislation of this type must be and is manifested in statutory interpretation.

Recall of Judges.

T. J. Walsh.

It is nowhere proposed to make the principle of the recall specially applicable to judges, but in the general assault upon the system it is insisted that, at least, an exception should be made in the case of such officers and it is in connection with them particularly that it is urged that it offends against the requirement of the Constitution that the government of each state shall be republican in form.

In this connection profuse reference is made to comments of various statesmen of revolutionary times, warning or denunciatory in character, on the evils and perils of unrestrained democracy and on the necessity of an independent judiciary. It is ventured that the clause of the Constitution appealed to was inserted as a safeguard against the dangers that inhere in the democracy, one of which is the destruction of the independence of the judiciary, a result which, it is assumed, will ensue when the judges are subject to be recalled by the people who elect them. Until this ingenious theory was advanced it was quite generally, it might be said universally, believed that the word "republican," as employed in the clause in question, was used by way of contrast to "monarchical."

It was dread of pretensions to kinship which might be set up in some of the states that inspired the provision to which reference has been made, if the testimony of his-

tory is of any consequence whatever. It is companion to that part of the last clause of the ninth section of the first article prohibiting Congress from granting any title of nobility, and the corresponding provision of the tenth section, forbidding the states making any like grant. Referring to those provisions conjointly, Cooley says:

"The purpose of these is to protect a union founded on republican principles and composed entirely of republican members against aristocratic and monarchical innovations." (Cooley on Const. Lim., 28, 6th Ed.)

Whatever persuasiveness there might be in the line of alleged reasoning by which the conclusion is reached that the systems adverted to affect a state government with a fatal anti-republican character, must appertain to the initiative and referendum, not to the recall. The former secures what has been appropriately called direct legislation by the enactment of a law in the one case and its nullification in the other. Therein lies the vice, as it is claimed, of the system, the essential characteristic of a government republican in form being, it is said, that its laws are made by delegates or representatives of the people, not by the people themselves, except as they are so represented. The recall, on the contrary, has no reference to direct legislation. It has its field only in the case of representatives chosen to make the laws, to construe them or to administer them. It can operate only in a government which is republican in form.

However, then, the system of direct legislation may encroach upon the essential character of a republican form of government, the recall is not amenable at all to the strictures of its critics in that direction. It is sufficient to say, in passing, that the Supreme Court of Oregon, in an opinion written by Judge Bean, since appointed United States district judge, in which all of his associates concurred, has held that the argument is unsound and untenable even as addressed to the initiative and referendum. (*Kidderly v. City of Portland*, 74 Pac., 710.) It would be surprising if any court did reach any other conclusion, in view of the prevalence of the town-meeting system throughout New England at the time of the adoption of the Con-

stitution, a feature of the state government which, still persisting, has been extolled as "the wisest invention ever devised by the work of man for the perfect exercise of self-government and for its preservation."

It apparently did not occur to the fathers of the Constitution that those states in which the people were permitted to legislate directly in respect to certain affairs, where the method of a pure democracy constituted a part of their system of government, were, by reason of that fact, ineligible to membership in the Union. They were all admitted, yea, invited to come in, with such local governments as prevailed among them. By the very act of admitting their Representatives in Congress that body determined that such existing governments were republican in form; and so with respect to the systems devised by the people of the new states as they were severally taken into the Union.

So the United States Supreme Court said in *Minor v. Happersett* (21 Wall., 162), using the following language:

"No particular government is designated as republican, neither is the exact form to be guaranteed in any manner especially designated. The guaranty necessarily implies a duty on the part of the states themselves to provide such government. All the states had governments when the Constitution was adopted. In all the people participated to some extent through their representatives elected in the manner especially provided. These governments the Constitution did not change. They were accepted precisely as they were, and it is therefore to be presumed that they were such as it was the duty of the states to provide. Thus we have unmistakable evidence of what was republican in form within the meaning of that term as employed in the Constitution."

Let this test be applied to the recall as it affects the judicial office. At the time the Constitution was adopted, in no instance was either the governor or any of the judges elected by the people. The latter were uniformly either appointed by the governor or elected by the legislature. In New Hampshire, Massachusetts, Connecticut, Rhode Island, Pennsylvania, and South Carolina they could be removed by address of that body, a majority vote sufficing in Rhode Island and Pennsylvania. Bear in mind, by address—not by impeachment. While impeachment proceedings contemplate definite charges and a trial, neither the one nor the other is requisite in the case of removal by address. A simple vote ends the official career of the individual against whom it is successfully leveled.

This method of terminating the official life of the incumbent of a judicial office was borrowed from the English system, under which, since the revolution of 1688, judges have been and still are removable by a majority vote of each house of Parliament.

So that to maintain that a constitution embodying the recall applicable to the judicial office is antirepublican we are driven to the conclusion that a state under whose fundamental law judges are elected by a majority vote of the legislature and are removable by a majority vote of the legislature is republican in form, while that state whose judges are elected by the vote of the people and who are removable by a majority vote of the people is not.

It is exceedingly difficult to understand why it is good business policy in every great corporation to retain, when it can, the right to dismiss its secretary, auditor, or treasurer at will, but is impolitic for the people to retain the right to dismiss a county clerk or a state treasurer when they see fit to do so. A business man or corporation is sometimes forced to enter into a longtime contract in order to secure or retain the services of a valued servant, but it is avoided, for obvious reasons, whenever unnecessary. Usually such contracts bind both parties. The public servant, performing similar services, has his employer bound, but he may escape the obligations of his service, at any time, by resigning. As to the legislative office, it affords such a check upon a career of corruption, regrettably not infrequent, particularly in municipal councils, as ought to commend it generally as to such. In this respect to such offices, a course of conduct extending over a considerable period of time may bring conviction of guilt to all intelligent observers that can not be resisted, and yet evidence sufficient to expel be entirely unavailable.

And why should a member who has violated the pledges under which he was elected, repudiate the measures to secure the passage of which he was delegated, and outrages by his votes the convictions of his constituents on great public questions, continue, against their will, as their alleged representative? In a neighboring state a member was lately elected to the higher branch of the legislature for

a term of four years at an election at which the choice of a United States Senator was the paramount, not to say absorbing, question before the voters. He was returned largely because of his professions of allegiance to the popular candidate for that office, to whose cause he publicly and privately declared himself devoted. He voted for the local favorite for ten days or thereabout, and then deserted to become the leader of the forces of his antagonist, a man of great wealth who had the support of a giant corporation, believed to be the master of the political destinies of the state, for whose legislative program the recreant member voted with striking consistence. He was overwhelmed with remonstrances from his constituents, and though they did not affect his course, he confided to some of his friends that he was opposed to the recall because if it prevailed he would be one of its first victims.

If it should be regarded as wise to punish the error of judgment on the part of the people of his county in electing him, by denying to them the right of recall, why should the interests of the rest of the people of the state be imperiled by his retention?

What ground is there for making any distinction in reference to those public servants upon whom devolve the judicial function? The expression "public servants" is used advisedly in connection with judges, upon the authority of the Supreme Court of the United States, which said, in *Luther v. Borden*:

"Judges * * * must enforce such (Constitution) as the people themselves, whose judicial servants they are, have been pleased to put into operation."

Now, in thirty-four of the forty-eight states the judges are chosen by popular election. These include Georgia, which went to the elective system in 1798, the imperial State of New York, which followed in 1846, and North Carolina, which adopted the popular method recently. The overwhelming sentiment of the people of the United States is that the people of the states, respectively, are competent to choose their judges; and the experience of a century has fully justified that confidence. Irving Browne, in a

review of the New York Court of Appeals, published in the Green Bag in 1890, said:

"I have given the names of more than one hundred judges, with particulars of many of them, nearly all of whom were first nominated by the people. I believe that under a system of appointment by the governor this test would not have been equalled in merit and distinction, and I point to it as a standing refutation of the argument that the people are not fit to name their judges."

The Federal system of appointment for life, as distinguished from the state system of election for limited terms, is commended in many quarters as immeasurably the superior. However it may be in other parts of the country, it is observed that in our section, at least, the Federal judges are selected very largely from those whose talents were discerned by the people, and who had by them been elected to high judicial position. Vandevanter in Wyoming, Field, Sawyer, Ross, and De Haven in California, Bean and Wolverton in Oregon, Hawley in Nevada, Hunt in Montana, and Rudkin in Washington, are of this class. There is not an argument that has ever been advanced against the recall of judges that is not equally forceful when applied to the election of judges by the people in the first instance.

The main contention, about which the argument invariably proceeds, is that the recall would rob or tend to rob the judge of his independence, impelling him constantly, in his official acts, to court the favor of the people by consulting their hopes concerning litigation before him and conforming his judgments to the desires of the majority. That is exactly the line of argument that has been vainly pursued for over a century to stem the tide of democracy, as it involves the judicial office. Leonard Jones, in the course of some comments in the American Law Review, in disparagement of the idea expressed by Mr. Browne, above quoted, said:

"The worst thing, however, about the elective system is not the fact that it affords unworthy men the chance to obtain judicial office by purchase or other corrupt practices, but that it necessarily to a greater or less extent destroys the independence of the judges."

"What chance," he adds, "is there that a judge who is shortly to seek a re-election by the people will uphold the law and justice in a case where the popular clamor is against law and justice?"

What chance, indeed, unless he be a man and not a catiff? With that kind of a judge the argument has added force as it is directed against the elective system, because that kind of a judge is likely to solace himself with the reflection that so far as the recall is concerned it may not be invoked against him anyway, while if his term is expiring and he seeks re-election, he is up against it to a certainty. Moral courage is a quality cardinal in character in a judge. He is called upon to exercise it in the daily discharge of his duties. He is fortunate, indeed, if he is not obliged repeatedly, in his official career, to brave the enmity of powerful interests whose activity is more to be feared than an outburst of passion upon the part of a community or state against an upright public official who faithfully discharges his duty as he sees it.

Even a Federal judge, unless he be free from every honorable ambition, or has reached the topmost round, is not exempt from these trials, as the testimony of Judge Purdy before the Sugar Trust investigation committee would seem to indicate.

Herein lies, in my judgment, the weakness of the Federal judiciary. The judge is believed to be utterly independent of the people. He does not owe his appointment to them, nor does he look to them for advancement. No reason can ordinarily be conceived why he should incline his judgments to their supposed will in any case, and he is accordingly exempt from any suspicion in that direction. If he decides a case in such a way as to meet popular approval, the incident is regarded as the natural result of the equities of the case, and is speedily forgotten. But when the case turns in the other direction, the opportunity to attribute to sinister influences its outcome is by no means wanting. Setting aside the idea of corruption in its graver form, or in its milder manifestations, as disclosed in the Swayne impeachment proceedings it would be idle to attempt to disabuse the public mind, in this day, of the notion that the great interests, insidiously, perhaps, but none the less effectively, exercise a potent influence in the selection of Federal judges.

While this belief prevails, a suspicion affecting his pre-

dilection is easily engendered by a course of decisions, whether right or wrong, by a Federal judge, avowing such interests. The social aspect is not an unimportant one. By the method of his selection and the character of his duties he is apart from the general mass of men, who naturally assign as his associates and confidants the more opulent and influential, whose prejudices he imbibes and whose views he the more readily adopts. These are some of the considerations which have given rise to the belief, prevalent in some quarters, that the Federal courts are a haven for the big corporations that are more or less inclined to rapacity.

The Federal system certainly secures, in the very highest degree possible, the independence of the judges—that is, it makes them independent of the people. The system can not be regarded as perfect, however, if the national courts fail to win and maintain the confidence of the great mass of citizens—unless the people feel that those courts are theirs, the judges thereof their judges, doing their work. One distinguishing merit of the recall as applied to judges is that it operates to permit the restoration of public confidence in the court presided over by a judge against whom it was invoked. Why should a judge, guilty of habitual intoxication, for instance, be permitted to continue in office, passing upon grave questions affecting the lives, liberties, and fortunes of citizens, until his term expires or he is removed by the slow and uncertain process of impeachment? A day is too long for him to sit bringing to the duties before him a mind inert or befuddled from drink.

Independence in the judiciary is undoubtedly a quality much to be desired. But we may pay too high a price to secure it. Undoubtedly we do when we keep on the bench the obviously unworthy and unfit judge lest that class, small, as I insist, at best, in whom fear of their political future is the ruling passion, might be swerved from the path of right. Independence is not a character essential alone in the judicial servant of the people, as might be imagined from the discussion of the subject before us. All public officers are required to exercise it in varying degree in the proper discharge of their duties. The governor of

the state, the President, is supposed to be equally deaf to what is called "popular clamor." They enforce the law against rich and poor alike, high and low. It was this quality which endeared Andrew Jackson to the American people and gave to Theodore Roosevelt a popularity perhaps no less widespread. A prosecuting attorney will find daily exercise for the same virtue. It made Folk and Hughes national characters.

And yet I can not think of an officer against whom the recall might be more appropriately invoked than a recreant prosecutor who pursues the outcast and winks at the crimes of the high and mighty. He might, of course, be deterred by selfish political motives from proceeding against lawless strikers who shed innocent blood or wreck property but I should rather fear his being appalled by some franchise grabbing plunderbund or domineering industrial corporation that finds gain in operating in violation of law. The youth of this state are being taught by Prof. Smith, holding the chair of political science in its rising university, that the "independence of public officials which our forefathers were so anxious to secure has been found to be a fruitful source of corruption." "A realization of this fact," he says, "has been responsible for the introduction of the recall system under which the people enforce official responsibility through their power to remove by a vote of lack of confidence."

It might be said that there is more occasion for a recall provision in Massachusetts, where the judges hold during good behavior, than in jurisdictions where the tenure is for a limited time. But the tendency is to protract the terms of judges, particularly of the higher courts. In New York, the justices of the court of appeals are elected for fourteen years; in Pennsylvania the term for the corresponding office is twenty-one years; in Montana six. The shortest of these terms is a long time to tolerate a judge who needs removing. The decrepitude of age may come upon him unexpectedly early in life. Illness may overtake him and even render him unappreciative of his own infirmity. A Massachusetts judge was removed for such a

cause. With the recall it is comparatively unimportant how long the term is.

One of the grounds of complaint against the elective system is the brevity, as a rule, of the terms, in consequence of which it is claimed the bench has no attraction to the best talent at the bar. The term could ordinarily be safely lengthened with a recall provision. In Oregon it is proposed to extend the term of members of the legislature to six years, but make them subject to recall at any time. Its most ardent advocates admit that it will be a long time until the recall enters the field of the national organization, but if any state is disposed to try the experiment, it is with confidence asserted that, upon reflection, no reason will appear why judges should be excepted from its operation.

United States, 6ad Congress, 1st Session. Senate Doc. No. 99.

Election and Recall of Federal Judges.

Robert L. Owen.

It will be contended by some that the recall of judges might safely be left to the National Legislature or to the state legislatures, but should not be left to the electorate, because the electorate would not be so conservative in the exercise of the power to recall a judge as their representatives in the legislature.

The answer to this is that the electorate of an American state and of any of the American states is abundantly conservative and moves very slowly, more slowly than their progressive representatives would move.

A political party is controlled by caucus and in convention, and is easily moved by passion or impulse. The people in their peaceful homes or in the quiet seclusion of a voting booth are not so easily moved.

The reactionary argument that the people are turbulent, unduly excitable, that they are wild and visionary, that they are unduly passionate, that they comprise an irresponsible mob unworthy to be trusted with power, comes with

poor grace from those who hold their honors, their dignities, and their salaries from these same people.

The long-suffering patience of the people is best evidenced by the forbearance with which the people permit men in public service to give currency and approval to these unfounded and absurd criticisms of the great American electorate.

Every Member of Congress is elected by direct vote of the people. Have the people intelligence enough to elect Senators and Members of the House, and yet do they lack intelligence to elect or to recall a judge? Would they recall a Senator or a Member of the House who performed his duty faithfully and truly represented his constituency?

Mr. President, when our Federal Constitution was adopted in 1787 none of the judges were elected by the people, although there was a greatly restricted suffrage; but since that time, although the suffrage has been greatly enlarged, so that we have almost universal manhood suffrage and in five states woman's suffrage, yet with the growth of modern Democracy or progressive Republicanism very many of the states have adopted the doctrine of electing judges and giving them fixed terms of office. 36 states elect the judges by popular vote; Connecticut, Georgia, Rhode Island, Vermont, and Virginia elect by the general assembly; and Delaware, Maine, Mississippi, New Hampshire, and New Jersey appoint. All of the states have the recall by fixed tenure, except Massachusetts, New Hampshire, and Rhode Island, all of which recall by the legislature. Thirty-two of the states provide by constitution for recall of judges by the legislature.

It is therefore substantially the unanimous opinion of all the states that judges should hold by fixed tenure and be subject to the automatic recall of short terms or by resolution of the legislature.

When the Constitution of the United States was adopted, in many states the legislatures directly elected the judiciary, as in Connecticut, Rhode Island, New York, Delaware, New Jersey, Virginia, North Carolina, and Georgia, and they exercised control over the judges by fixing their term of office "during good behavior," as was done in New

Hampshire, Massachusetts, New York, Maryland, North Carolina, South Carolina, and Virginia, and by a short tenure of office of one year, as in Rhode Island, Connecticut and Georgia, and by the right of recall by an address of the legislature, as in Massachusetts, New Hampshire, Maryland, Delaware, South Carolina, and Pennsylvania.

In many of the States—Alabama, Delaware, Florida, Kentucky, Louisiana, Michigan, Mississippi, Nevada, Pennsylvania, South Carolina, Texas, etc.—the language is used in the constitution that where the offense charged is not sufficient ground for impeachment that judges may be recalled or removed by address of the legislature.

It is not denied that judges should be impeached when guilty of high crimes. All the state constitutions, and the United States Constitution also, provide for this, and it is justified by reason. But impeachment is far more serious than recall. Impeachments involve the conviction for criminal conduct. The recall is a much more benign remedy, and can be invoked where the fault of the judge or the reason for removal is not so great as in the case of impeachment and may be invoked with honor to the judge who has become infirm and who may for his own good be retired on a pension. All of the states provide for recalling judges by impeachment, but this recall carries disgrace.

Mr. President, the short tenure of office is a form of recall, by virtue of which the people who elect judges or have them elected by the legislature, or appointed by the governor, prevent them from becoming a judicial oligarchy, prevent them from becoming tyrannical, and prevent them from becoming judicial rulers or indulging any unseemly exercise of power by recalling them with a short tenure of office.

As I pointed out, three of the states, when the Constitution was framed, elected judges only for 12 months. It is wonderful, when a careful examination is made, to see how universally the people of this country have provided against judicial oligarchy in the states by a fixed tenure of office.

Thirty-four of the states elect judges by the qualified electors, six others elect judges by the general assembly.

and only six states appoint by the governor and council. Forty-three states exercise automatic recall by the fixed or short tenure of office and 32 states recall directly by the legislature; and no state fails to have the right of recall either by the short or fixed tenure or by the legislature.

It will thus be seen that all of the states have an automatic recall of judges by a short tenure of office, excepting Rhode Island, New Hampshire, and Massachusetts, all three of which expressly provide in their constitutions for the recall of judges by the legislature.

New Hampshire has recalled her judges four times, and I understand on grounds of policy. Rhode Island recalled her judiciary—by dropping them at the end of the short tenure—which declared an act of the Rhode Island Legislature unconstitutional.

I insist that the recall of judges by the voters of a state, in the seclusion of the ballot box, is more conservative than to remove judges by caucus in a legislature, where passion or interest might affect the judgment. The people of Arizona can be relied upon to deal justly with this question, and their right of self-government in this particular can not be justly denied.

Mr. President, there are many degrees of malfeasance and of misfeasance justifying recall which would not justify impeachment. Mr. President, a judge upon the bench is merely a lawyer employed by the people, at a salary, to interpret the law. He does so in the light of his environment, influenced by his education, by his previous political and judicial predilections, influenced by his long practice at the bar. Perhaps he may have been the valued attorney of various powerful corporations, whom he has long served and whose interest in him has led to his preferment on the bench by the skilled influences of commercial interests brought to bear upon the appointing power. Suppose such a judge in a series of decisions uniformly decided cases against the interests of the people, whose servant he had become, and uniformly decided such cases in favor of special privilege, whose paid servant he formerly was. Should the people have no right to recall him except by impeachment? Such a judge may be perfectly

conscientious; but will that suffice to justify his continuance in office under such circumstances?

Mr. President, the right of recall of judges is all the more important when we recognize the fact that the big interests of this country have taken infinite pains to bring about the nomination and promotion as Federal judges of those whose opinions and bias of mind were known to be favorable to their point of view.

Whenever a vacancy occurs on the Federal bench, immediately the most lively and active pressure is brought to bear by various business interests in favor of candidates desired by them, and I pause to remark that it is quite immaterial whether such candidate has previously been regarded as a Democrat or as a Republican.

I do not mean to suggest that candidates thus urged are in any degree dishonest or corrupt, although that is always a possibility; but I do mean to say that they are merely human beings. That such candidates have been practicing lawyers, some good lawyers and some not so good, gives them no divine unction of infallibility. That they are influenced and controlled in their opinions by their education and their environment and by the arguments which they have previously been engaged in making is absolutely certain. I do mean to say that corporate interests do seek to place upon the federal bench and in the state courts those candidates who are known to favor the point of view of the special interests as against the interests of the people, and that I do believe such appointments on the federal bench are the rule and not the exception.

The federal courts have invaded the Constitution and invaded the rights of the states and invaded the legislative function of Congress and of the states, and have become an instrument through which the special interest have been enabled to block all progressive legislation of recent years.

Up to 1887, 20 federal statutes and 185 State statutes had been held invalid by the Supreme Court of the United States alone. This does not include the innumerable State statutes which the lower Federal courts have nullified under the shield of the Supreme Court decisions. This list will be found in One hundred and thirty-first United States reports, Appendix CCXXXV, and since that time this list has been greatly increased, and the decisions have been most objectionable since 1887. These decisions have usually

been made by a divided court, but in some cases the change of a single vote would have completely changed the result. The legislation thus destroyed was practically all carefully devised to meet existing and recognized evils and enacted in response to an overwhelming demand of the people. (Gilbert E. Roe.)

These various decisions have not only nullified statutes of the greatest importance, passed for the protection of the people, but other decisions have been made which are, in effect, judicial legislation.

Out of the great multitude I submit a few instances as illustrations. For example:

In *ex parte Young* (209 U. S., 123) the attorney general of Minnesota is punished for contempt for performing his duty in obedience to the statute of the State of Minnesota regulating the rates of public-service corporations.

The statute of Texas was set aside as unconstitutional in the case of *Galveston, Harrisburg & San Antonio Railroad Co. v. The State of Texas* (210 U. S. 217), taxing the gross receipts of railroad companies within the state.

The statute of Kansas taxing the Western Union Telegraph Co. was set aside in like manner. (216 U. S., 1.)

The Oklahoma constitution establishing a corporation commission was declared invalid under the Constitution of the United States by the decision of Justice Hook, March 29, 1911.

Judge Sanborn's decision in the case of *Sheppard v. Northern Pacific Railway Co.* on April 11 practically destroyed the Minnesota statute providing for the regulation of rates of public-service corporations.

The fourteenth amendment intended to protect the negro, has been twisted from its purpose to protect the trusts and monopolies in imposing long hours of labor on employees on the absurd theory that to deny the employee the right to work long hours is a denial of his constitutional "privileges."

Everyone knows that the sole intent and purpose of the people in adding this amendment to the Constitution was to protect the then recently emancipated negroes in their rights of citizenship. The courts, however, have made this amendment include all manner of trusts and corporations and of contracts and practices, none of which were even in the thoughts of the people when they adopted the amendment. In the hands of the courts this amendment has become a shield to protect corporations and combinations of wealth from the legislation aimed at them by an indignant public and also a sword by which statute after statute has been cut down, enacted by the lawmaking branch of the Government in the public interest. (Roe.)

The employers' liability act, for the protection of employees, was held unconstitutional by 5 to 4. (39 Cong. Rec., 11, 1904; 40 Cong. Rec., 93, 1905.)

The compulsory arbitration act, passed as the result of the great strike at Chicago in 1894, and intended to prevent the recurrence of such unfortunate difficulties, was destroyed by the Supreme Court. (*Adair v. U. S.*, 208 U. S., 184.)

The interstate commerce act has been emasculated by the Supreme Court. (Exhibit A.)

The wholesale liquor interest was protected by the so-called package decision (*Lesley v. Hardin*, 135 U. S., 100), and it required a special act of Congress to authorize police powers of the states to apply to liquor in original packages (*Wilkerson v. Rahrer*, 140 U. S., 545).

The principles laid down in the Declaration of Independence were reversed in the insular cases, holding that this Republic had imperial power to govern and control other people as subjects, etc.

The workmen's compensation law of New York was, in like manner, destroyed by the New York courts. (*Ives v. So. Buffalo Ry. Co.*, 201 N. Y., 271.)

The income-tax law was struck down in like manner by the Supreme Court. The serious error of the Supreme Court in this case I heretofore pointed out on the floor of the Senate, where the inhibition of a direct tax on a state was absurdly construed to inhibit a direct tax on a citizen of the United States. (May 7, 1909, Rec., 1821, and May 17, 1909, Rec., 2104.) The decision in this case, by the change of the vote of one judge—of one lawyer in this court, appointed at whose instance we do not know—has cost the mass of the people of the United States a hundred million a year for over 16 years, \$1,600,000,000 in all, and relieved those best able to bear the tax of a like amount.

One billion six hundred millions of dollars by the vote of one man, appointed by what influence? We do not know and can not say. No such power ought to be put in the hands of any man. No man not responsible to the people or the representatives of the people ought to have the power to control the fiscal policy of this Nation contrary to the law of the people of the Nation and contrary

to the will of the Senate of the United States and the Congress of the United States. No such unconstitutional decision would have been rendered if the court had been subject to recall.

Minneapolis Tribune, February 21, 1913.

Recall of Judges. James Manahan.

Opposition to legislation providing for the recall of judges is a survival of the old doctrine that the king can do no wrong. It rests on distrust or fear of the people. Timid folks, with little understanding of life, fear people because there is in people evidence of energy. These timid ones prefer to rely for security on institutions created by law and constitutions, because these things are apparently lifeless and undestructive. But the distrust of the people felt by the timid and uninformed is not serious opposition. It is easily removed by education and replaced by the courage and confidence which all honest men should feel in considering the integrity of mankind in general. The determined opposition to the recall comes from fear, but not the fear of the timid. It is the fear felt by selfish and greedy exploiters; felt by corrupt politicians; felt by men whom conscience makes uneasy; whose judgment questions their own moral right to the wealth they have acquired; whose selfishness dreads the day of retribution.

Those who favor the recall make no attack upon the courts. We propose to protect the courts from the duress of big business and corruption by political bosses. The recall never has wronged and never could and never would destroy a just judge; it is the shield of good judges, protecting them from the importunity of special and corrupting influences and securing them in the affection and love of the people, for whose general welfare they should labor; it is and could be a weapon only to use against unfaithful judges and I ask, should not unfaithful public servants be scourged from the temple of justice sternly and with promptitude.

The suggestion that the recall might be used by the corporations and special interests with their organization is a childish suggestion in view of the fact that every special interest and its public spokesmen; the lawyers and lobbyists of the trusts, railroads and public service corporations, generally are always found opposed to the recall; if the recall would help the Hydro-electric company, the Stone-Webster Water Power trust, the railroads, the brewers and Twin City Rapid Transit company, the steel corporation and the Standard Oil work their will on judges you would find their lawyers, editors and preachers favoring the law and not opposing it. No man who has ever studied any recall law in force or proposed, with intelligent consideration, will argue that such a law would enable disappointed suitors in private litigation ^{to} rebuke or menace the court whose judgment disappointed them. No disappointed litigant could get one per cent, much less 20 or 30 per cent of the voters in any jurisdiction to sign a petition for the recall of a judge, and even if he could the people would give that judge, if he were a good judge, such a splendid vindication at the polls as to more than repay him for what the contest cost him in money, labor or anxiety.

Forum. 47: 157-68. February, 1912.

Democracy and the Recall. Gwendolen Overton.

To the average voter, the recall of the judiciary does not stand for rebellion against restraint. Mob-unruliness it is not—in motive, at any rate. In those states which now have the recall the standard of citizenship and the general intelligence is high, the voters are markedly representative of a race whose strongest characteristic has always been the love of just and stable government—but which has found that these are only to be obtained by altering laws and constitutions.

Among the objections raised to this movement are that it will cause the people to infer their superiority to the law from control of its interpreters; that a judge is entitled to trial for alleged bad behavior; that the three functions of

government, legislative, judicial and executive, will cease to be separate; that there will follow the debasement of the judiciary, and above all, that there will remain no safeguard of minority rights.

To the first it might be answered that the people are already theoretically superior to the law, in that it lies with them to amend or alter the constitution. In England their control is still more direct and immediate, and the Englishman is notoriously law-abiding. Nor does it seem quite reasonable to insist that citizens will have less respect for the law if they may recall its interpreters—after formal preliminaries extending over a considerable period—than if they may defeat them at the polls.

As to the second contention—it is perfectly obvious that conviction, even in quite extreme cases of misconduct, would be well-nigh impossible. A solitary but sufficient example of the difficulties to be encountered has been furnished very recently in the notorious case of a Federal judge in a western State.

To the third objection there is a reply that the three functions of government have not in fact remained separate and perhaps could not do so practically.

In respect of the argument that good men will not offer themselves as candidates for the bench if recall hangs over them—as far as civic and State officials have been concerned, a better class seems to have come into the field where the undesirable can be removed. It may equally well be so with the judiciary. For it is more than doubtful if occupants of the bench would ever be unseated capriciously, for no graver cause than merely an unpopular decision.

Those who believe in our tolerant and "non-chalant" populace deem it likely that the conduct of affairs would be attended with no visible change whatsoever. With aggregations of men responsibility and trust have a sobering effect, and the fear of doing injustice, of intrenching upon the territory of a special knowledge, will quite possibly make the recall an expedient never resorted to. And this will be more certainly the case if, as is probable, members of the judiciary would be at greater pains than now to avoid coming under suspicion, and would take a legitimate lead of the

people by pointing out where laws and procedure likely to cause offense could be bettered—a duty wherein they themselves are tardily admitting dereliction. There will, let us hope, be less of that tendency—which calls forth the strictures of an eminent modern writer upon jurisprudence—to consider an action at law, “a game that may be won or lost by playing some particular move.”

But concerning the most theoretical and therefore the most important, of the objections named—that the minority will lose its right of being assured, in so far as possible, that its case will receive unbiassed consideration at any given moment. Here there arises an issue not to be disposed of carelessly.

It is so obvious a platitude that one can with difficulty bring oneself to suggest again—what, nevertheless, appears to need perpetual reiteration—that principles of jurisprudence and government are not unchanging, or more exactly that there is but one which is so—that nothing is permanent save change.

In the *History of English Law* Maine reminds us that “the matter of legal science is not an ideal result of ethical or political analysis; it is the actual result of the facts of human nature and history.” We are told by Bryce that “though its (the law’s) leading doctrines and its fundamental institutions are in some respects essentially the same, in all civilized communities, still, every given system is . . . forever changing, growing and decaying, both in its theory and in its substance . . . each nation, through what the Germans call its legal consciousness, the maker and moulder of its laws.” And in *Civil Government* Locke says: “Law in its true notion is not so much the limitation, as the direction of a free and intelligent agent to his proper interest.”

If we admit the above conclusions to be true, how are we to insist that there can be but one method of safeguarding a minority? In an essentially democratic community, where the average of intelligence is high and self-government has become nothing less than second nature, there may be another method more “actually the result of the facts of human nature and history,” because it allows the “direction by a free and intelligent agent to his proper interest.”

With us it should take the form of guaranteeing minority rights consciously by precisely that which has always guaranteed them—though unconsciously: the sense of justice and responsibility of the majority. For civic self-consciousness is the acknowledged purpose of the race's development.

If the populace has reached the point where it submits to a law guaranteeing the security of one, or any small portion of its number, the next step in advance will consistently be that it should school itself to allow that security without sense of compulsion. The whole trend of humanity, in its social relation, is in this direction. And though injustice may occasionally result, it would probably not be oftener than at present—since we cannot but allow that the integrity of the judiciary has an enemy in great wealth not less formidable than any lurking in the "spirit of democracy."

It remains, of course, debatable whether humanity—among ourselves—has yet reached the stage where the experiment may be safely made. Yet since evolution disregarded brings about revolution, it seems safe to say that a people is ready to be entrusted with the rights it deliberately and thoughtfully claims, and that it will very soon learn to use them properly. Upon what other principle, indeed, does our state exist, or progress?

Academy of Political Science (N. Y.). Proceedings. 3: 141-6.
January, 1913.

Recall of Judges. Gilbert E. Roe.

If there ought to be any distinction, in my judgment it would be in favor of applying the recall to judges rather than to many other public officials. Here is my principal reason for saying this: the judges, more than any other class of officials, ought to be close to the public if they are going to perform their proper function in this government. The President, with his control of the army and navy and the vast influence which he has the means of exercising, may be able to carry forward a policy for a time without popular support; the legislative branch of

the government, with its control of the finances, also is measurably independent of the people's will; but the courts have no army and navy; no control of the finances; they must depend for their support upon the approval of the people of the country, or they must fail in their function. Therefore I say that whatever brings the judge and the people closer together is in my judgment a good thing, and that is the reason—one of the reasons, at least—why I advocate the application of the recall to judges.

The recall would be a good thing not only for the judge and his decisions, but for the people themselves, and after all that is the real reason why we want any of these democratic measures. I am not at all sure that where their are direct primaries better candidates have been nominated than under the old system, but I do know this, that it has been a good thing for the people; the discussion, the agitation, the education, the interest excited has laid broad and deep the principles of democracy in those communities, and that is why it has been good.

That there does exist in this country to-day a widespread distrust of the courts—not of individual judges merely, but of the courts and their purposes, and a dissatisfaction with the result of work of the courts,—is a fact that we must all admit. I have tried to analyze somewhat the basis or reason for that dissatisfaction, and as briefly as I can I want to tell you my conclusions about it.

Since the foundation of this government, the people have been reaching out and gaining more and more complete and direct control over both the executive and the legislative departments of the governments. You know that the constitution provided for the device of an electoral college because it did not trust the people, because the framers of the constitution were unwilling to commit to the mass of people the important function of electing the President of the United States. Then also it was felt necessary that one branch of the legislature should represent the wealth and financial interest of the country, hence the provision for electing United States senators by state legislatures and electing them for long terms. At once the people set about destroying these barriers, and so they

found a way to get around the electoral college, and to advocate the constitutional provisions providing for the election of United States senators by state legislatures. The direct primary is another step in the same direction, so that more and more all through the years from the time the constitution was framed to this moment the people have been seeking and securing more complete control of the executive and legislative branches of their government bending these officials more completely to their will, and as I think, properly so. But that is not the question at this moment.

With the judiciary just the opposite course has been pursued, or rather the judiciary has traveled an opposite road. With a constitution that gave so little power to the Supreme Court of the United States that John Jay, the first Chief Justice, resigned, because he said there was not power enough in the office to make it worth a man's time to hold it,—starting out from that point and coming down to this time the courts by their decisions have removed themselves more and more from popular control. I am not going to enter on the discussion of the question whether the constitution granted to the court the right to declare a law unconstitutional; it is my belief that it did not. That question is one of the most interesting in all our history. But we all agree upon this, that when the doctrine was first announced that a court could declare a law unconstitutional, always that announcement was coupled with the expression that it was a power so dangerous for a court to exercise, so dangerous to what we call popular government, that a court would never exercise it except in a case that was free from all doubt. When you put a statute side by side with the written constitution and it was perfectly plain that the two were in conflict only then could the court say that the statute was unconstitutional and must fall. Everyone agrees that that was the position the court took when it first announced the doctrine. But today, so far have our courts got away from that old landmark laid down by Marshall and other great judges of that day that no one knows to-day, when a legislature or the Congress passes a law, whether it is

law or not until it has been passed on by the courts. We have often found of late years, when it has been sought to remedy some great abuse, as in the income-tax law, the workmen's compensation acts, employers' liability laws and many others, that there has been built up a great body of public sentiment in favor of the law, and then that public sentiment became so strong that it could knock successfully at the doors of a legislature or the Congress and command attention there. So after long days or weeks or years of discussion the law was passed by the Congress or a state legislature, each body containing many of the most eminent lawyers of the state or nation, every objection possible having been brought up and discussed and answered and provided for, and then the law went to the President, who had the benefit of the advice of the ablest minds of the country, and he signed it, and it was written on the statute books. After all this, the day comes to enforce this law, and you go into court on it and the question is all argued out whether it is constitutional or not, and the court thinks it is. Then there is an appeal to the next court. The next court thinks it is, and perhaps that involves a decision of four or five or six judges, all holding it constitutional. Then another appeal is taken to a little higher court, and perhaps here three judges out of five say that it is not constitutional, that it shall not stand. So then you have the word of three men against all the wisdom of the lower courts, of the President, of both houses of Congress and of the people—and your law falls.

Because that thing has happened in this country within your memory and mine not once but many times, not on unimportant matters, but on matters that touch vitally the lives and the happiness of the people in a majority of the homes of this country, because laws of the kind above referred to have been stricken down and destroyed, because three or four men clothed with judicial authority have set themselves up in opposition to the will and intelligence of the rest of the country, because of this there has been a demand on the part of the people to bring their judicial officers more completely within their control.

The result of bringing them within the popular control

would be good for the judges and good for the people. We lawyers are a good deal to blame about the mistakes that judges make. If the first speaker had been elected to the United States Senate at the time he was appointed to the bench he would have brought just the same integrity, ability, conscientiousness of purpose and fidelity to the one set of duties that he has brought to the other,—and yet in public estimation how different would his position be. We feel that it is anybody's privilege to go out and praise or criticize or discuss the members of the United States Senate or House of Representatives, and the result is on the whole the establishment of a very good feeling between the people and the members of the law-making branch of the government; but when a man goes on the bench we have been taught to feel that he goes into a different realm, that his acts must not be discussed, his conduct must not be brought under criticism. I do not believe that that is a right view, but I say we lawyers are largely responsible for bringing about the false sentiment on that question, and the thing that would do most to correct that is the recall. Make your judges and their actions the subject of discussion; let the people talk about them, and not be fined for contempt of court if they do talk about them; let us discuss what the judge does just as we discuss what the member of Congress does.

It was said that the people are apt to know nothing about the character of the candidate for judicial office and to be indifferent to it. That is the way I would have the recall and would have a life tenure unless the recall was exercised. In the hurly-burly of an election there are many candidates and many issues, the record of any particular candidate is lost sight of. But in a recall election the man and his conduct stand out; it is the one thing you are considering. There has been in this country just one attempt to recall a judge; that was in Oregon in 1911.* A judge there presided at a murder trial in a very unpopular way, making such rulings that the man charged with the crime escaped conviction. A considerable part of the com-

*Since this article was written Judge Weller has been recalled in California.—Comp.

munity believed that the judge's decisions were wrong, and that they argued such corruption or such incompetency that he ought to be removed. So they started out to circulate a recall petition. As you know, every state that has a law providing a recall, safeguards it so that several months must elapse between the filing of the petition and the election. In this case it was necessary to get twenty-five per cent of the voters of the district to sign the petition that a recall election be held. The law also provides that each side shall at the public expense state its reasons why the recall is demanded on the one side, and why the judge should be continued on the other. After that the election is to be held some months in the future. The people in Oregon did not take even the first step, although the case appeared a rather flagrant one. They could not get anywhere near the twenty-five per cent necessary even to submit the question to another election. But, you may say, if a recall would be so seldom exercised, why do you advocate it? For just the reason that if there is the power of recall, if the people feel that they have control over the judge, and the judge feels that he is really the servant and not the master, then you will have a condition which will make the recall unnecessary except in rare instances and at long intervals.

NEGATIVE DISCUSSION

Academy of Political Science (N. Y.). Proceedings. 3: 147-56.
January, 1913.

Substitutes for the Recall of Judges. J. Hampden Dougherty.

After almost two years of discussion does anything remain to be said in favor of judicial recall? No public question in recent years has received more consideration. It has been the theme of debates, pamphlets, books and resolutions. Practically all the bar associations throughout the country have opposed it. The debate in Congress upon the admission of Arizona with its constitutional provision for judicial recall was so exhaustive as to leave nothing to be said. The speeches of statesmen like Root and Lodge in the Senate, and Pickett, Kinkaid, Legare and others in the House, conclusively showed its fallacy. President Taft's veto message, a great state paper destined to rank high in history, thoroughly shattered the notion. The vote upon the Arizona bill in the Senate and the House would be completely misunderstood were it assumed to represent a preponderant sentiment in favor of judicial recall. Many senators and representatives to whom the idea was repugnant voted for Arizona's admission because they felt that the state itself had the right to determine whether it would install such an unwise policy or not. A few opponents of the measure believed, as did President Taft, that such a revolutionary doctrine was subversive of republican government.

Judicial recall has been abandoned by some of its most conspicuous advocates and the notion of recall of judicial decisions substituted for it. Thus Colonel Roosevelt who, two years ago, in describing judges as "fossilized minds"

asserted that judicial recall might become advisable, now advocates recall of judicial decisions. Two recent critics of our judicial system, Mr. Gilbert E. Roe and Mr. William L. Ransom, differ so radically that the arguments of one may well be set off against those of the other. In his interesting book entitled *Our Judicial Oligarchy*, Mr. Roe regards judicial recall as the remedy to prevent the courts from usurping powers which according to him they do not possess. Mr. Ransom, on the other hand, while equally alarmed at what he conceives to be judicial usurpation, invokes the remedy of recall of judicial decisions. No one has more incisively refuted judicial recall than has Mr. Ransom, and no one has better shown the fallacy of the recall of judicial decisions than has Mr. Roe.

Of judicial recall Mr. Ransom says:

If a judge incorrectly gauges "the preponderant opinion" as to the social necessity for a particular law, why remove him? Why not let the people vote directly to decide what the majority opinion is? If a judge is dishonest, impeach him; if he is incompetent, remove him by complaint before the legislature or refuse him re-election, but it does not seem quite fair to require him to take the final guess as to what the "prevailing morality" and the "preponderant opinion" of a state really is, and then chop off his judicial head if he "guesses" or "calculates" wrong.

For Mr. Ransom's specific Mr. Roe, on the contrary, has the scantest respect. He says:

The recall of judges is to be carefully distinguished from another idea, which is supported by some men of prominence, and which has come to be described as the "recall of judicial decisions." The former may be applied without materially departing from our constitutional form of government; the latter is absolutely destructive of the constitution. The recall of judges merely means that where a judge has shown from any cause that he is not discharging the functions of the judicial office in fundamental and important matters as the people desire, he will be discharged and a new judge possessing the necessary technical qualifications selected in his place. The recall of judicial decisions means that the wholly untrained layman shall undertake to do, personally, the highly specialized and technical work of a judge. The great vice in this idea, however, is that it would be used as a means of amending the constitution by a majority vote. It would soon come about that laws would be passed, simply for the purpose of having them declared unconstitutional, and then by a popular vote overturning the decision of the court, and in that respect amend the constitution. The constitution, therefore, would be immediately reduced to the level of a statute, since any portion of it could be amended, or repealed, at any time by a mere majority of the popular vote. While there is little likelihood of this idea finding a permanent place in the minds of the people, that anyone should be found who seriously advocates this idea is significant of the extent to which the dissatisfaction with the courts has gone, and ought to show the necessity of reforming the courts, along lines less revolutionary.

Mr. Ransom has Colonel Roosevelt on his side. Colonel Roosevelt has written an introduction to Mr. Ransom's book in which he declares that the people ought to have the power to decide for themselves in the last resort what legislation is necessary in exercising the "police" powers, or "general-welfare" powers, so as to give expression to the general morality and the general or common opinion of what is right and proper, and he is careful to say that he is advocating a system which "will obviate the need of such a drastic measure as the recall." What Colonel Roosevelt seems to overlook is that the people to-day enjoy ample power to change their constitutions so as to secure whatever legislation they may desire in the interest of the public welfare.

Thus those who think judges usurpers and oligarchs are divided into two hostile bands. One would introduce judicial recall as the remedy, the other would have the people recall the judicial decision by popular vote, and each stigmatizes the other's panacea as in the last degree dangerous and unwise.

Surely after all the discussion upon this subject, argument can hardly be needed to show the unwisdom of judicial recall. As I view it, the proposal is based upon two fallacies:

First, it is declared that the judiciary has transcended its functions in passing upon the constitutionality of legislation, and that the judiciary is the undemocratic and unprogressive branch of the government. These things are asserted as to the judiciary not only of the nation but of the several states; yet in the majority of the states the judges of the higher courts are elected by popular vote, and, in many instances for short terms.

Second, it is held that the courts, instead of attempting to follow the constitution which they have sworn to support and to which every statute should conform, ought, on the contrary, to uphold a law in conflict with the constitution, if that law expresses the popular will, thus substituting the popular will, or as it has been called, the "manifest and express will of the people" for the constitution as their guide in certain classes of cases—this class being cases

affecting the social conditions of the whole or part of the community. According to this view, it is not the constitution but the so-called "popular will" that should be regarded as the law of the land.

As I read history the courts have not usurped the power to declare legislation unconstitutional. To say that the judiciary is the unprogressive branch of the government is merely another way of saying that it is the business of the judges not to make law but to declare it, and in this sense the judiciary is the most conservative branch of the government. The courts say what the law is, not what they think it should be, and as constitutions are in theory at least easily amendable, the law can readily be so modified by amendment as to express the most enlightened public sentiment. The public will be presumably expressed in the constitution. The constitution must remain the supreme law until the people see fit to change it, and certainly in the states the power of amendment of the constitution is easily available. In New York state the constitution is, if anything, too readily amendable. The constitution thus represents the "popular will" for the time being, and to attempt to substitute something else as an expression of the popular will by an unconstitutional method is in reality to subvert the popular will.

The recall would inevitably fail. If I wished to pack the bench of this state with the tools of bosses, or the instruments of the great, powerful and wealthy interests that too often dominate legislatures and courts, I would strongly advocate judicial recall. Unscrupulous combinations with large funds at their command could use this power for the removal of the incorruptible judge. It would be a weapon that could readily be turned against the people in behalf of special interests, and nothing could be more dangerous to the popular welfare.

Recall is a species of punishment; it implies dissatisfaction. To my mind there is something inherently wrong in punishing a judge for the expression of an honest and intelligent opinion. I can understand punishment when a person does wrong, but to punish one who with ability is presenting his own best convictions, is, to my mind, an

utter absurdity. The bench should be composed of lawyers who express their convictions, not mere popular instruments. The recall was applied by James II of England, when he dismissed the Chief Justice of the Common Pleas and his associates, because they were unwilling to give a judgment that accorded with the royal will and not with the law. Jones, the Chief Justice, had been abject, even servile, but when told by the king that he must give up either his opinion or his place, answered: "For my place I care little; I am old and worn out in the service of the Crown, but I am mortified to find that your Majesty thinks me capable of giving a judgment which none but an ignorant or a dishonest man could give."—"I am determined," said the king, "to have twelve judges who shall be all of my mind as to this matter." "Your Majesty," answered Jones, "may find twelve judges of your mind but hardly twelve lawyers." The king dismissed him and his associates. This is what would happen with judicial recall in force. Judges would seek to know the popular will and to follow it, which would be subversive of jurisprudence, and in turn of the rights and liberties of the people themselves.

Assuming that there are errors in the present administration of justice which need to be corrected, assuming that judges have encroached upon the legislative branch of the government and constituted themselves a species of upper house to veto legislation by substituting their opinion for legislative opinion, the remedy does not lie in the recall of judges or in recall of their decisions. On the contrary, the remedy is far simpler, more efficacious, more wholesome, less subversive and revolutionary.

In the first place, compel judges to return to the sound, old-fashioned notion that no law may be held unconstitutional unless it clearly transcends legislative power. It is a travesty to assert a law plainly and palpably unconstitutional which five judges out of a bench of nine consider unconstitutional, while the remaining four believe it within legislative authority. A statute which three judges out of seven or four judges out of nine deem constitutional is not plainly and palpably unconstitutional, and no court by any

vain show of reasoning can make it appear to be so. Whenever there is doubt of the validity of a statute, the courts, as the late Mr. Justice Harlan of the Supreme Court admirably said, "must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation."

If necessary, I would favor an amendment to every constitution depriving the judges of power to nullify laws by a majority vote. A constitutional provision might be thus formulated: Judges shall have power to declare statutes unconstitutional only when they plainly violate an express provision of the constitution and then only by unanimous or greatly preponderating vote.

Second, I would so amend the national judiciary law, or if necessary the federal constitution, as to permit a review in the highest tribunal of the nation of every statute involving the due-process-of-law clause, whether the statute was upheld or abrogated by the state court. The guarantee of due process of law is the same in words—in any event it is identical in meaning—in the national and the various state constitutions. Had the judiciary act permitted, the *Ives* case, which according to the New York court of appeals offended against this clause of the state and the national constitution, would have been reviewed in the United States Supreme Court. With one final tribunal to determine whether any statute, state or federal, conflicts with the due-process clause, there will be evolved a clear definition of the clause; there will also be harmony in decisions. Furthermore, in every case involving this provision, attention will be centered upon the court that possesses this final authority. The guarantee of due process of law may have been distorted and extended far beyond its original meaning, as some claim; yet, on the other hand, the words of a constitution must be fluid, and no meaning once assigned can control the signification of the words if new circumstances give them a new meaning. Every interest which regards its property as unjustly affected, or perhaps confiscated, by a statute the purpose of which is social improvement, has a right to be heard, but all such statutes should be brought to final test before the Supreme Court of the United States. That court is to-day more

progressive than any state court of elected judges—a fact that tends to show the fallacy of judicial recall. Judges entrenched in office for life, and therefore immune from recall except by impeachment, have been found more favorable to legislation designed to secure the popular welfare than judges elected and subject to recall at fixed intervals.

Third, to avoid the danger of the creation of an utterly irresponsible bench, I would favor the freest criticism, consistent with decorum, of judicial decisions and especially of judicial conduct, and make impeachment and removability for cause real remedies. Every judge ought to discharge his duties under the shadow of possible impeachment. Impeachment could be made a live remedy. Its tedious and elaborate processes should be abolished. Let a judge be put on trial on the complaint of an association of lawyers or of any other responsible city body. No servant of the people should enjoy immunity from removal for cause. Our political inventiveness is atrophied indeed if we cannot devise methods for the fair and expeditious trial of judges, without resorting to recall. With proper publicity judicial removal would rarely be necessary. The bar and the public should be stimulated to make all reasonable complaints so that the record of judges could be followed. A judge should be removable not merely for one specific offense, but for a generally poor and unsatisfactory record.

Annals of the American Academy. 43: 239-77. September, 1912.

Judicial Recall—A Fallacy Repugnant to Constitutional Government. Rome G. Brown.

Without admitting the evils enumerated and assumed by the advocates of the judicial recall as a justification and final argument for their proposition, I would begin where they leave off. I would assume, for the purpose of argument, the existence of many of the evils which they relate. I would remind them that the best elements of the national state bars are seriously and energetically working for practical reforms in legal procedure, in the manner

of the selection of judges, and in the prevention of delays and against the miscarriage of justice, and this, too, by feasible and constitutional measures and by every constructive and really progressive method which can be devised; and that the fact that satisfactory remedies have not yet been attained, is not the fault of the bench or of the bar, whose leaders have for years been urging upon the people, through the legislatures, fully formulated and efficient remedial measures. The fault lies with the people themselves, whose direct representatives in the legislatures, national and state, refuse properly to consider and act upon proposed laws of authenticated and undeniable efficacy. The failure or absence of remedy in no degree constitutes a justification for the application of the drastic and suicidal measures involved in the judicial recall.

Contrary to the methods of the recall advocates, let us bring ourselves back, first, to a consideration of the nature and functions of the system to which this untried specific has been prescribed. Then let us examine the real character of the proposed remedy itself. By no other method can its desirability or its efficacy be determined. By no such method has it ever been presented by its advocates. It will appear that the proposition of the judicial recall, whether in the form of the recall of judges or of judicial decisions, is not one of remedy for existing evils, but is an attack upon constitutional government itself; for it strikes at the very keystone upon the stability of which depends our present form, or any form, of constitutional government.

The Nature and Functions of our Constitutional Government

To discuss comprehensively the questions involved would be to repeat and enlarge upon great constitutional authorities who have presented in general and in detail the growth, nature, and extent of constitutional functions, including those of the judiciary. In brief outline let us here recall some great demonstrated truths as we examine the fallacies of the advocates of the judicial recall in the assumptions which they make as to the nature and functions of our constitutional form of government.

The first and most inexcusable fallacy is the assumption that the existence of evils, political, economic, or judicial, arising in connection with this or that department of government is necessarily an indictment of the administration of the government, of the particular department, in connection with which the evils are found to exist, or of the government itself. Such assumption disregards the ever-present and irremediable element of human imperfection. It is not and never can be within the power of man, at any stage of civilization, to establish, maintain, and administer any institution, governmental, sociological, industrial, or otherwise, free or even substantially free from incidental oppression, injustice, and inequality, or from sacrifice, to some degree, of natural and theoretical rights of person and of property. The crudest social compact involves, to a greater or less extent, sacrifice. The most perfect form of government must involve the same sort of sacrifice and, with its human element, also many evils, both those avoidable and those unavoidable, evils which in their concrete application instance injustice, inequality, and even oppression.

The Constitution was established not with the expectation of forming a "perfect" union, but a "more perfect" union, and to establish—not finally and without exceptional failure, but in general, so far as human foresight and experience could provide—justice, domestic tranquillity, means of common defense, the blessings of liberty to ourselves and posterity, and to provide the best means for working out, with all the vicissitudes of success and failure, those blessings of liberty. Its object was to establish a government which should in the long run, all things considered, be most conducive to "promote the general welfare" of the people who should live under it.

That the accomplishment of these purposes is best assured by our Constitution is taught by the science of government, by experience, and by authority. Gladstone characterized our Constitution as "the most wonderful work ever struck off at a given time by the brain and purpose of man." No change in the essential form of government, no fundamental constitutional change, can be justified on the

plea of the existence of unremedied or even irremediable evils. As expressed in the words of Lincoln:

Before entering upon so grave a matter as the destruction of our national fabric, with all its benefits, its memories, and its hopes, would it not be wise to ascertain precisely why we do it? Will you hazard so desperate a step while there is any possibility that any portion of the ills you fly from have no real existence? Will you, while the certain ills you fly to are greater than all the real ones you fly from—will you risk the commission of so fearful a mistake?

Appeals to popular prejudice inducing unrest and discontent at existing evils should be met with distrust. Clamors for the "rights" of the people should be checked with a steadfast but more altruistic regard for the preservation of the Constitution which was expressly established to safeguard those rights. There should be kept in mind the warning of Hamilton when he said:

A dangerous ambition more often lurks behind the specious mask of zeal for the rights of the people than under the forbidden appearance of zeal for the firmness and efficiency of government. History will teach us that the former has found a much more certain road to the introduction to despotism than the latter, and that of those men who have overturned the liberties of republics the greatest number have begun their career by paying an obsequious court to the people; commencing demagogues and ending tyrants.

The fundamental fallacy of the judicial recall is the assumption that the object of our form of government and the goal toward which its administration should work are the establishment and promotion of a government directly by the people, in which the will of the majority, as expressed at the polls, should at all times receive the nearest possible immediate response through the machinery of the different departments by which the powers of government are administered. The assumption is, not merely that ours was to be a government generally democratic in form and in essence, but that in fact it was intended to be one of pure democracy; and that any substantial check or restraint upon the responsiveness by governmental departments to the will of the people expressed through their majorities from time to time are, when shown by experience to be real checks and hindrances, imperfections, and immediate or gradual elimination of which should be the chief object of any reform movement which is entitled to be denominated "progressive." It is the presentation of this fallacy, regarding the fundamental object of our system of gov-

ernment, to the individual voter, whom this fallacy places upon a pedestal, as the direct representative of the democratic idea of "sovereignty" and whose sovereign rights the same fallacy has assumed to have been usurped—it is this fallacy which is the root of all the misinformation, misunderstanding, deceit, and illusion which have given the judicial recall its seeming popularity. Its falsity, however, is demonstrated by even the most superficial consideration of the nature and character of our form of government, of the functions of its different departments, and of the objects and efficiency of our Constitution.

Our government is a democracy, but it is a constitutional democracy, and the very object of the constitutional feature is to place in the way of the sovereign people those limitations, checks, and balances which, while not preventing enforcement of the will of the sovereign people, should insure the wise and deliberate exercise only of wise and deliberate, and therefore properly restrained, sovereign authority. Its primary object was to prevent the immediate enforcement of the unrestrained, unchecked, and unlimited will of the majority, whether expressed at the polls or otherwise. Sovereignty invested in a single person or in a few, passing, without consideration of other distinctions, by inheritance, checked only by promises of respect for individual rights—promises wrested from the sovereignty by force of arms, as were those of our Bill of Rights from King John at Runnymede; rights, however, vouchsafed only by ties of tradition or by precedent—constituted the tyranny of monarchy, the evils and abuses of which, fresh in the minds of our Constitution makers, rendered it abhorrent to them.

But, learned in the history of nations and conscious of the fate of states subjected to the unrestrained will of the people, they saw another danger to be avoided, greater than that of the tyranny of monarchy. Our government must insure to its people not only the blessings of liberty, not only the natural right of dominence by the people as sovereign, but it must safeguard forever those blessings and rights by a form of government adapted to that purpose and the stability of which should, as far as human

intelligence could provide, be made certain against the self-destructive elements inevitably accompanied by an absence of proper checks, limitations, and balances, upon even the sovereign power of the people. They were not satisfied to leave such checks and limitations to rest upon precedent and to be presented by analogy or implication from the recorded history of events. They must be expressed and recorded as the supreme law of the Nation, paramount to the will of the sovereign power and to the will of its representative governmental departments. In their wisdom they saw in this express and written, fundamental and paramount law the only sure and safe protection against the dangers of the tyranny of democracy.

Recognizing the fact that, with further industrial, economical, and social development, the fundamental law thus established might not be sufficiently elastic for the necessary adaptation, they provided for amendment by a method, slow, but not cumbersome, as facile and speedy as could be consistent with deliberate and well-considered action, and therefore with the necessary safeguards against the results of caprice, temporary passion, or prejudice. While exercising the greatest wisdom of their times, they bowed wisely and consistently to the wisdom of future generations, but only to a wisdom which reaches and acts upon sound judgment, as their judgments were then pronounced, after dispassionate contemplation, deliberation, and discussion of facts, theory, and precedent.

The government established is a government "by the people." It is the nearest to a government by majorities that can be established consistent with the necessary elements of stability and the safeguarding against tyranny, which safeguards can only be retained by the constitutional checks and limitations upon the exercise of the sovereign authority and of the powers of its representative departments in the government. Any measure which, like the judicial recall, ignores these safeguards or their necessity is subversive.

Daniel Webster said in 1848:

Whoever says or speaks as if he thought that anybody looks to any other source of political power in this country than the people must have a strong and wild imagination, for he sees

nothing but the creations of his own fancy. He stares at phantoms. Let all admit what none deny, that the only source of political power in this country is the people. Let us admit that they are sovereign, for they are so; that is to say, the aggregate community, the collected will of the people, is sovereign.

Abraham Lincoln said:

A majority held in restraint by constitutional checks and limitations, always changing easily with deliberate changes of popular opinion and sentiment, is the only true sovereign of a free people. Whoever rejects it does of necessity fly to anarchy or despotism.

Quoting these words from Lincoln, Senator Elihu Root at the recent Chicago convention said:

That covenant (the Bill of Rights) between power and weakness is the chief basis of American prosperity, American progress, and American liberty. * * *

We know that there is no safe course in the life of men or of nations except to establish and to follow declared principles of conduct. There is a divine principle of justice which men can not make or unmake, which is above all governments, above all legislation, above all majorities. The limitations upon arbitrary power, and the prohibitions of the Bill of Rights which protect liberty and insure justice, can not be enforced except through the determinations of an independent and courageous judiciary. * * *

So the three departments, the executive, legislative, and judicial, were established, each separate from and independent of the others. No changing whim of the people could, even in two years, change the entire legislature representation, for the Senate could not be entirely changed except after six years. It vested in the legislative department certain specific powers and expressly prohibited the exercise of other powers by either the federal or the state governments, expressly reserving to the states respectively, or to the people, all powers not so expressly delegated to the United States nor prohibited to the states. In order to avoid the oppression of the tyranny of undeliberate or capricious actions by the sovereign people, it was directly and expressly provided in section 9, Article I, against the suspending of the privilege of the writ of habeas corpus and the passing of bills of attainder or ex post facto laws, against the levying of disproportionate taxes and of duties upon articles exported between these states; prohibiting any state from enforcing any law impairing the obligation of contracts and from levying any impost or duty.

And, later by amendments, the same supreme law prohibited the Congress from interfering with the establishment and free exercise of religion, with freedom of speech, and

of the press, or the right of people peaceably to assemble and to petition for redress of grievances; against the quartering of soldiers in any house without the consent of the owner, the violation of the security of person and property against unreasonable searches and seizures without warrants properly verified and issued, depriving any person of his life, liberty, or property without due process of law, and the taking of private property for public use without compensation; and insuring the right of trial by a jury for criminal prosecutions and the protection of the accused against arbitrary and illegal punishment, the prohibition of excess bail, of excessive fines and cruel punishments; the prohibition of slavery or involuntary servitude at any place within the jurisdiction of the United States; and further prohibiting any state from making or enforcing any laws which shall abridge the privileges or immunities of citizens of the United States, or which shall deprive any person of his life, liberty, or property without due process of law, or from denying to any person within its jurisdiction the equal protection of the law; and prohibiting either the United States or any state from denying or abridging the rights of citizens on account of race, color, or previous condition of servitude.

These are some of the limitations placed upon the legislative powers of the people in the federal Constitution, as similar limitations have been placed in all state constitutions, for the very reason that the judgment and discretion of the people could not at all times, and without restraint and limitations, be relied upon, especially in times of agitation and in times of political or economic crisis. The necessary safeguards could be insured only by these express limitations upon the power of the sovereign people to legislate, and upon the privilege of the people to have legislation enforced.

The functions, powers, and duties of the executive department and of its members were set forth and limited by express provisions.

By the same constitution, as by similar provisions in all state constitutions, there was also established a third department of government, the judicial, with certain express origi-

nal jurisdiction and with such appellate jurisdiction, both as to law and fact, as should be provided by the legislative department. And by the same instrument it was provided (Art. VI) that:

This Constitution * * * shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

And finally, it was expressly provided (Art. VI) that:

The Senators and Representatives before mentioned, and the members of the several state legislatures and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation to support this Constitution.

Such are the nature, purpose, and effect of the provisions defining the functions of our constitutional government; and it is in respect to these and similar provisions that it differs upon the one hand from a monarchy and upon the other hand from a pure democracy. While it is a government by the people, it is a government of checks upon the unrestrained exercise of sovereign authority.

Washington recognized the impracticability of a pure democracy and of the necessity in any form of government of restraint upon the exercise of the will of majorities. "It is on great occasions only," he said, "and after time has been given for counsel and deliberate reflection, that the real voice of the people can be known."

Madison said in the Federalist:

A pure democracy can admit of no cure for the mischiefs of factions. A common passion of interest will in almost every case be felt by a majority of the whole. A communication and concert result from the form of government itself, and there is nothing to check the inducement to sacrifice the weaker party or any obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence. Their conditions have ever been found incompatible with personal security or the rights of property, and have in general been short in their lives as they have been violent in their deaths. Theoretical politicians who have patronized this species of government have erroneously supposed that by reducing mankind to a perfect equality in their political rights they would at the same time be perfectly equalized and assimilated in their possessions and opinions and their passions.

Lecky, in his Democracy and Liberty, says:

One thing is absolutely essential to its safe working, namely, a written constitution securing property and contracts; placing difficulties in the way of organic change; restricting the power of the majorities; and preventing outbursts of mere temporary discontent and mere casual conditions from overturning the main pillars of the state.

The Federal Supreme Court, speaking through Chief

Justice Fuller, after quoting from Webster's argument in the Rhode Island case, said in the case of *In re Duncan* (139 U. S., 449, 461):

By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, national and State, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities.

These are some of the considerations by which is demonstrated the fallacy of pure democracy, or the fallacy of direct adjudication of constitutional questions by popular vote.

Another distinct but in many respects correlated fallacy indulged in by the advocates of the judicial recall is in respect to the nature and propriety of the powers of the judiciary. Where the evident functions of the court are admitted, their exercise even within constitutional limits, is criticized as unwarranted and arbitrary; and the very existence of such powers is made the object of denunciation.

The less shrewd, the more ingenuous and frank advocate, the typical advocate, of the judicial recall carries his fallacy to the extent of an assumption and express statement that the course, having originally been established as a useful, if not necessary, department of government, have actually usurped powers and functions in no wise originally intended for them; that they have arbitrarily and without constitutional warrant arrogated to themselves a sort of final despotism, inconsistent with all proper theories of our form of government, and have asserted by gradual usurpation a sort of sovereignty of their own at war with the real sovereignty of the people. It is by such usurpation, it is claimed, that the courts now exercise the power to declare invalid and unenforceable statutes found repugnant to constitutional provisions. It is asserted that these usurped powers should be taken away by other, and, as it is said, perhaps similar arbitrary methods defying all constitutional considerations; so that thus there may be recovered to the people themselves the powers which have been insidiously but wrong-

fully wrested from them. This fallacy persists, from the covert misleading attacks made upon our constitution through comparison with unconstitutional systems of monarchy or democracy, systems impossible for us, to the open, unqualified denunciation of our entire system of government and of its Constitution, and the open charge, as the basis of the argument for the judicial recall, that the judiciary have stolen, by gradual unconstitutional encroachment and usurpation, the real sovereignty which was intended to rest at all times and under all circumstances directly with the people.

Let us, who as citizens have sworn to support our Constitution and our government and laws under that Constitution, and who, respecting our oaths, insist that changes in government, or in the administration thereof, shall be brought about only through constitutional methods, consider for a moment the constitutional functions of the judiciary and the necessity of the preservation of these functions, and particularly of its independence.

The necessity of constitutional limitations as essential to the efficiency and stability of our form of government has been shown. But these limitations and restraints could not be enforced, except through a judicial department, and it was for that purpose primarily that the judicial department was established. It was upon the courts under our system of government that the only ultimate reliance could be placed to safeguard and enforce the constitutional limitations expressly placed upon the sovereign power of the people. It was expressly made the duty of the federal and of the state courts to observe this fundamental law as the supreme law of the land; this is the duty which has been performed by the federal and state courts, and it is by the performance of this function that our constitutional government has been preserved. This duty included the power of the courts to declare invalid any statute if repugnant to constitutional provisions. That this duty and power were originally imposed upon the courts as an essential feature of the new form of government and is in no degree a usurpation or afterthought is shown by the fact that the deliberations of the constitutional convention at all times assumed

such power to be intended for the judiciary. That it was so understood by the several states in ratifying the Constitution is shown by the fact that the existence of this very power in the judiciary was everywhere urged upon the states as the great safeguarding provision which, as against all the timorous feeling of uncertainty, should make them assured of the safety and efficiency of the new Constitution and act as a compelling reason for its unanimous adoption. Ellsworth, on January 7, 1788, urging the ratification of the Constitution upon the Connecticut convention, said:

If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who to secure their impartiality are to be made independent, will declare it to be void. On the other hand, if the states go beyond their limits, if they make a law which is a usurpation upon the federal government, the law is void; and upright independent judges will declare it so.

So at the same period Hamilton was urging in the *Federalist*:

There is no liberty where the power of judging be not separate from the legislative and executive power. * * * The complete independence of the courts of justice is peculiarly essential in a limited constitution. * * * Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the commands of the Constitution void.

So Chief Justice Marshall, in the case of *Marbury v. Madison* (1 Cranch, 368, 388), summarizes the constitutional provisions including those making it the supreme law of the land and binding upon all courts, federal and state, and requiring all judges to swear to its support and the requirement by the yet sovereign people, through their legislatures, of an oath by every judge that he "will faithfully and impartially discharge" all the duties incumbent upon him according to the best of his abilities and understanding, "agreeably to the Constitution and laws of the United States"; and he demonstrates that the power and duty of the courts to declare invalid unconstitutional statutes are imposed not only by necessary implication but by express provision. He said:

This original and supreme will [the people] organizes the government and assigns to different departments their respective powers. It may either stop here or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten the Constitu-

tion is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested [either] that the Constitution controls any legislative act repugnant to it or that the legislature may alter the Constitution by an ordinary act.

Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means; or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law. If the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable.

Proposed Remedy of Judicial Recall Analyzed

In order properly to perform these functions the element of independence is absolutely essential. Without the quality of absolute independence the judicial department becomes a mere reflector of public opinion, constantly changing with the temporary whims, passions, and prejudices of the majority.

It was the better to preserve the independence of the judiciary that the tenure of office during good behavior was advocated and adopted. Eighty-seven years before the adoption of our Constitution the King of England had the arbitrary power of unseating a judge; but that power was taken away by the act of settlement, which secured to the judges their tenure of office during good behavior, subject only to impeachment by Parliament. In so much did the act of settlement make the government of England take on a feature republican in form, for the power of removal of judges was given to the representatives of the people, not to the people themselves directly, but to the Parliament which was given the duty to hear, try, and determine, and which was a body so constituted that it could perform that function.

So, in advocating the constitution and the good-behavior tenure, Hamilton said:

The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no

bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice in no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this all the reservation of particular rights or privileges would amount to nothing.

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men or the influence of particular conjectures sometimes disseminate among the people themselves and which, though they speedily give place to better information and more deliberate reflection, have a tendency in the meantime to occasion dangerous innovations in the government and serious oppressions of the minor party in the community.

In order to avoid the danger of subserviency by reason of short term elections, the Massachusetts constitution, as late as 1870, provided for tenure of office for judges during good behavior, subject to removal by impeachment. As stated in that constitution:

It is essential to the preservation of the rights of every individual, his life, liberty, property, character, and that there be an impartial interpretation of the laws and administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit. It is therefore not only the best policy but for the security of the rights of the people and of every citizen that the judges of the Supreme Judicial Court should hold their offices as long as they behave themselves well.

It necessarily follows that any measure of reform is obnoxious and unwise in so far as it is antagonistic to these basic principles of our form of government. Any measure which is directly repugnant to these principles is not only inexpedient, but absolutely indefensible. Such is the character of the judicial recall, whether proposed in the form of the recall of judges or of judicial decisions. The judicial recall is not remedial, but baneful in its nature. It is not either constructive or progressive, but is destructive and reactionary.

It is not necessary to defend other methods of removal of judges nor to discuss reform measures by which the method of removal by impeachment may be made more efficient. The removal by address of the legislature or by impeachment involves the constitutional elements of a notice to the accused, an opportunity for hearing, a hearing upon the facts and upon the law, and an adjudication in accordance with the fundamental constitutional principles protecting the rights of every person accused of an offense. The recall is not only devoid of all of these constitutional ele-

ments, but involves all the vices against which these fundamental protective features were intended. Even if the causes for recall were expressly confined to misfeasance, and malfeasance, and even if specific charges should be required, how could it be possible for a proper or sufficient notice to be given to the accused in the limited space of 200 words?

Suppose the charge be one of incorrectness in a decision involving questions of fact and law, how could a defense to such a charge be made in the same limited space? And, even if issues of fact and law were sufficiently framed, what guaranty is there that any of the adjudicators—that is, the voters—who finally pass upon the issues, shall consider these or any issues? The result must be that the very bringing of an indictment by the filing of a recall petition shall be taken by a large number, and perhaps by a majority, as of itself sufficient proof that a change is desirable. There can be no hearing except by public clamor and upon statements, however false, which are spread broadcast by newspaper and by pamphlet and by rumor, without the slightest pretense of verification even by any form of oath. At the very best it involves a "trial" upon mere hue and cry, and a decision upon complicated and important issues by the mere arbitrary dictum of a misinformed and prejudiced populace.

But, as to the recall of judges, we are not without experience; and the history of its attempted application further demonstrates its vice. It has been attempted to be justified by the claim that in Oregon, for instance, where it has been in force for four years, no abuse of the privilege has arisen and no judge has actually been recalled. But the strongest indictment against the recall comes from its advocates, or its apologists, who instance its application in Oregon and other States.

While no actual recall of a judge has been obtained in Oregon, attempts at judicial recall have been made, and undoubtedly other and successful attempts would have been made had it not been for the supposed necessity for further legislative action in order to make it effective. An uncompleted attempt at recall was made against a circuit judge

because he sustained as legal the provisions of a city charter allowing the sale of intoxicants. The crucial instance of the application of the judicial recall in Oregon is that instituted against Circuit Judge Coke, who, upon the trial of one McClellan for the murder of a well-known citizen of Roseburg, instructed the jury that if they found certain facts, of which there was evidence favoring the defense, such facts would sustain the claim of self-defense and therefore of justifiable homicide. The instructions of the judge were exactly, in terms and in principle, in accordance with the law expressly stated by the Supreme Court of Oregon in another somewhat similar case. Their correctness is scarcely debatable from a lawyer's standpoint. The jury found the facts as claimed by the defense, and, following the instructions of the court, acquitted McClellan. Local passion and prejudice against the defendant had been excited to the point of demanding conviction and were turned against the judge, whose fairness and judicial qualities had never before been questioned. A recall petition was instituted and objection was made to the nature of the 200-word charge as not being sufficiently specific to allow proper answer. The Attorney General held that under the law the charge need not be specific and that it might, as in that case, consist of merely a series of epithets applied to the judge complained of, as "incompetent," "unfair," and the like.

It is admitted by candid advocates that these abuses of the recall are inevitable and irremediable and that it is never possible to determine whether an official has been thereby deposed upon grounds asserted in the recall petition or others really the basis of the demand for the recall; for at election he must satisfactorily justify his entire official conduct and compete with the political ambition of other candidates precommitted upon any of the judicial questions at issue, and he must, at the same time, face personal opposition at a time when it has been brought to its most virulent pitch against him and in the midst of greatest feeling of discontent, passion, or prejudice induced by ignorance, calumny, and willful machinations. It is admitted also that, as against possible influence in some cases of a salutary

nature, there are many palpable instances where the very possibility of a recall has caused obvious "sins of omission" on the part of officials who refrain from enforcing the law, as they would otherwise, for the fear of a recall. Former advocates of the recall now admit that the representative and important factors of the recall, and particularly of the recall of judges, are caprice of the public, immaterial and extraneous issues, politics, personal revenge, and deliberate misrepresentation. One Oregon writer, referring to the position of a judge in that state, says:

It is unjust, it is degrading, it is inimical to his independence that he should be compelled to defend his acts or politics or decisions with one hand and combat political ambition and personal popularity of candidates who may oppose him with the other.

Yale Law Journal. 22: 1-18. November, 1912.

Independence of the Judiciary the Safeguard of Free Institutions. William B. Hornblower.

It is urged that men are frequently chosen for the bench who are incompetent, inefficient, or even corrupt; that the remedy by impeachment for the removal of a judge found to be incompetent, inefficient, or corrupt, is grossly inadequate; that where a judge is found to be incompetent, inefficient, or corrupt the people whose servant he is should have the right to summarily remove him without the formality of a trial and to substitute in his place a better man. This sounds plausible, but to anyone who is familiar with the working of our judicial system, the fallacy of this argument will be apparent if he stops to give it full consideration.

So far as concerns the question of incompetency or inefficiency this is a matter for difference of opinion. What constitutes incompetency or inefficiency? Every defeated litigant considers the judge who decides against him to be incompetent and inefficient, and in this opinion he is frequently encouraged by his counsel who is temporarily smarting under what he considers an undeserved defeat. The question of the competency or efficiency of a judge is one to be determined by a careful consideration of his judicial decisions as a whole. To have the question of the

competency or efficiency of a judge passed upon by popular vote is as irrational as it would be to have the competency or efficiency of a physician passed upon by popular vote. How are the people to determine whether the judge whose recall is proposed is really inefficient or incompetent? It is easy to allege inefficiency or incompetency, but opinions will differ as to whether a particular judge is or is not inefficient or incompetent.

When we come to the question of corruption, the injustice of having such charges passed upon by popular vote after a heated campaign with violent harangues by popular orators without any legal proof of the charges is manifest. To have the honesty or dishonesty of a judge determined by the effect of stump speeches upon the platform, by loose declamations and unsworn statements of interested parties without any opportunity for careful examination, is to subject a judge to an indignity and a possible injustice which may blast his reputation for a lifetime. How often have we heard disgruntled clients, or even indignant lawyers, complain that a judge has been bought or improperly influenced to render adverse decisions when we are confident that such charges are absolutely unfounded, and are the product of an over-heated imagination resulting from the bitterness of defeat in a hard-fought litigation!

The recall will furnish a ready weapon for party warfare upon the judges. Republican judges may be voted out and Democratic judges voted in and vice versa, whenever the shifting popular majority shall change from one party to the other.

Certainly as a method of improving the personnel of the judges, the method of subjecting them to the indignity of a recall whenever any defeated litigant can persuade a majority of the voters that a judge is incompetent or inefficient or corrupt is the worst possible method. To force a judge against whom such charges are made to take the stump and defend himself in public while still on the bench would make his position as a judge intolerable to himself and worse than useless to the public.

It is difficult enough already, especially in our larger cities, to induce the ablest and most successful members

of the bar to forgo the honors and pecuniary rewards of the bar for the labors and the smaller compensation of the bench. If the position of the judge is to become subject to the indignity of a possible recall, it is hard to see what inducement there would be to a successful practitioner to incur the risk of such indignity.

Moreover, the futility of the scheme for judicial recall as a remedy for existing evils, real or imaginary, is apparent. The advocates of recall overlook the fact that the successors of these incompetent, unefficient, or corrupt judges are to be selected by the voters of the very same constituency which is responsible for the election of the incompetent or inefficient or corrupt men who are to be recalled, and the identical political bosses, or conventions, or primaries, which selected the recall judges are to select their successors. We are thus traveling in a vicious circle. Elect incompetent, inefficient, corrupt men, recall them and elect voters in their place to be again recalled and voters again to be elected in their place by the same constituency and same methods.

It needs no prophet to foresee what the effect might be upon the mind of the judge where on the one side was a litigant with powerful political influence, and on the other side an individual contending for his rights against such influence. So, where an individual is contending for his rights or his alleged rights against the interests or supposed interests of the community in which he lives, or against a strong popular prejudice, how can any but an exceptionally strongminded judge be expected to hold the scales of justice even? Our ideal of a judge as we heretofore understood it is that of a judge absolutely fearless, knowing no friend or foe, knowing neither majority nor minority, knowing neither rich nor poor, fearing no man and no body of men. We have heretofore endeavored to cultivate his ideal by giving a judge a fixed term of office during which he can be removed only for cause and after an opportunity to be heard in his own defense by a competent tribunal. If we substitute for this ideal a judge who may at any moment be recalled by reason of an unpopular decision, the tendency is to have a judge constantly listening for a wave of public opinion with his ear "to the ground" or

eager to curry favor with the bosses who control the nominations, and who can incite the voters to the exercise of their special power of recall. I do not mean of course to say that every judge would be of this character or that the standard of judicial independence and integrity would be immediately disturbed, but I do say that the tendency and the constantly accelerating tendency would be to substitute for the fearless and independent judge a spineless, flabby, cowardly judge, a reed shaken by the wind.

But it is said that our entire administration of justice in this country is full of technicalities and delays and that this constitutes an excuse, if not a justification, for the present distrust of the judiciary and the present agitation for some such rough and ready remedy as judicial recall. It must of course be admitted that many of the criticisms of our judicial system and of the administration of justice are well taken. I do not admit, however, that there is any special force in these objections when directed against the courts of the present day as compared with the courts of any previous date. Indeed, I am inclined to think that the courts of to-day are less technical and less disposed to sacrifice substance to form and to sacrifice justice to method of practice than at any previous period in the history of our country.

Comparisons between the methods of administering justice in this country and those which are prevalent in England are misleading. Extreme instances are cited from one or another of our 48 states, and these extreme instances are compared with the average course of justice in Great Britain. If, however, we take the states by themselves and compare one with another and compare the generality of the states with the courts of Great Britain we should find a very different story.

Central Law Journal. 75: 44-5. July 12, 1912.

Recall of Judges—A Warning. Wendell P. Stafford.

The argument for the recall assumes that judges are only agents of the majority, and easily reaches the conclusion that when the agent fails to satisfy his principal he may

rightly be recalled. That fallacy in the argument is in the assumption that the judge is an agent. He is not an agent in any proper sense of that word. He is not the agent of either party to a cause. He is not even the agent of both parties. If his duty were to trade and compromise between them he might be considered the agent of both. But that is not his duty. His duty is to decide; it is not for him to please, nor seek to please, either party. It is his duty to decide the question between them as the law and the evidence may require.

**Academy of Political Science (N. Y.). Proceedings. 3: 163-4.
January, 1913.**

Selection and Removal of Judges. Edward D. Page.

The only other point on which the advocacy of this remedy seems to be founded is that it would be an education for the people to be obliged to discuss and determine for themselves the decisions of law with which they may be dissatisfied. Is it not rather a large undertaking for the people at large to gain the necessary knowledge to inform their judgment so that they may intelligently express opinions about matters such as those who advocate the recall of decisions would put before them? I think most people would rather not have such a responsibility put upon them, and I think that the real reason why there is now so little interest in the election of judges is that the voters realize that they do not possess the information necessary for them to express an intelligent opinion. They are, therefore, content to leave the matter in the hands of the men who make the nominations, following them because they have better judgment as to the qualifications of a judge. I think whenever you present a question which people know is beyond their judgment they will tend to rely on someone else, and if the boss seems the handiest man, they will naturally follow him. They certainly will follow the district leader, and he is always for the "ticket."

It is a fallacy to believe that the recall is a new question. There was a democracy in Athens, where the recall

of the judges prevailed. Was it not Aristides who, when the question of his recall was being voted on, sat beside the urn where the voters were casting their votes, and, asking a man who voted to ostracize him, "Do you know this Aristides?" got the answer, "No, but I am tired of hearing him called 'the Just.'" Socrates also was obliged to suffer the recall and to drink the hemlock because of the vague popular opinion against him. How can people who cannot possibly inform themselves be expected to express an opinion intelligently on such subjects? Are we ready as a democracy to present these questions to the whole body of voters? Can we trust a majority of them, no matter how much we believe in "the people," to express opinions intelligently on subjects on which they cannot be informed? Are we not going rather rapidly with political experiment when we expect the mass of the people, as in Oregon, to read and digest a book of two hundred and fifty pages before they can express an opinion on the questions at issue in a single election? Are we ready to advocate that state of affairs, and may we not, in our zeal for democracy, destroy democracy by its own excess?

Annals of the American Academy. 43: 278-85. September, 1912.

Dangers That Lurk in the Recall of the Judiciary. James A. Metcalf.

It is eminently right and proper that popular discussion and expression of preference should have its effect upon the courts; and it does to a very great extent. But these great problems, with their infinity of detail and ramifications of principles, are not proper subjects for superficial or popular determination. The public mind, awakened to a full moral consciousness, grasps the great principle of things in its superficial entirety, but is lost in the intricacy of its legal complexity. The people know what they want, and should have it; but the consideration of orderly procedure is of paramount importance. Some will doubtless say, at this point: "Abolish the complexity of the law entirely. Bring

it within the comprehension of the laity. The intricacy of the law is the very thing that gives it the character of a maze, within which the artful attorney wanders at will to the subserving of special interests, while the rights of the people get wholly and hopelessly lost."

There seems to be much justice in this complaint. If directed to a right remedy, its insistence cannot be denied. But its misdirected gaze loses sight of the fact that the body of the law is not an arbitrary arrangement of set rules and forms, which can be turned or twisted at will, or wiped out of existence and replaced by others in a moment of time. The judicial system is a part of the bone and sinew of the nation. The lines of the law are inextricably interwoven with the very network of civilization. The law has grown as the world has grown. It has developed just as fast as human intelligence has expanded. It is wholly inseparable from the web and woof of civil government. When the law weakens, liberty totters to its fall.

The very complexity of the law is of inherent necessity. Its every principle is a mile-post on the arduous ascent out of the valley of ignorance and superstition to the sunlit mountain-top of enfranchised intellect. Its every phase reflects the light of some victorious battle fought in the name of human happiness. Its every development marks a new step in the progress of mankind; and yet the old tenets must be retained, the precedents must be preserved, because human nature in the ultimate does not change with the passing of time, and every just decision of the courts must prove its consistency and authenticity by adherence to the principles that have been developed and perfected through countless racial struggles, out of which man has grown upward toward the perfect stature of divinity.

Certain well-defined principles of jurisprudence, when in action, are not necessarily then and there traced to their origin, nor obliged to travel wearily backward through ages of history in order to fetch forward their credentials. They have been such frequent visitors to the courts as to become well known. Yet each must be ready at all times to stand the test of conformity with practice and precedent, and to

survive a rigid application of all the rules of the common and statutory law.

How utterly vain to hope or expect that these infinite details, which provide a task of impossible comprehension even in a lifetime of exclusive study and research, should be brought immediately within the popular understanding. And if the people cannot comprehend and follow the full workings of the law, they are certainly not qualified to criticise the individual decisions of the courts, nor to declare the rightful deposition of the just or unjust judge who offends, as the case may be.

However, we must make an exception here, and must distinguish between the existence or survival of a law and its application to some particular state of facts or circumstances. The right to say what the law shall be resides solely in the people; the function of its application to each separate case belongs to the courts. The people, exercising the power of popular government, make the yardstick of the law; the courts will do the measuring, but must not change the unit of measurement. The distinction seems to be clear, unequivocal, thoroughly just and founded upon a proper conception of representative government.

American Bar Association. Report of the Committee to Oppose the Recall of Judges, 1912.

We hear much complaint about the courts declaring laws unconstitutional, and undoubtedly there have been cases where courts have taken too narrow a view and have declared unconstitutional laws which have been in the interest of public advancement, but these are incidents of any system of government, and we should bend our energies to correct the abuses rather than to destroy the system. The very foundation of our structure of government is an impartial judiciary to construe and enforce the provisions of the constitution made for the protection of personal liberty and property. By no other means can a constitutional government be maintained. Of what value or benefit to the people are limitations upon the power of legislatures, or the major-

ity of the people, if the majority may at any time violate them without a department of the government to stay its hands? To continue the efficiency of our form of government, it is necessary to maintain the independence and integrity of each branch, the executive, the legislative and the judicial. The independence of the judiciary is of the greatest importance because, of necessity, they are called upon to pass upon the acts of the other two branches.

The application of the recall to an ordinary official may be a question of expediency, but it is not fundamentally wrong. To apply it to the judiciary is in violation of those principles of government which ages of experience have demonstrated to be wise. In the states and in the federal government we have the right of impeachment, and in several of the states the right of removal of a judge by the legislature. If the right of impeachment is not sufficient, an adequate remedy can be created for the removal for conduct inconsistent with his office after complaint and an opportunity to be heard in his defense. In this way the independence of the judiciary is maintained, and a judge is removed simply for incapacity or misconduct in office, after having the charges made known to him and an opportunity to vindicate his honor.

Your committee will not consider in this report any particular law applying the recall to the judiciary, because, if the principle of recall could be applied with safety to the judiciary, defects in the forms of laws might be remedied, but the principle we believe to be dangerous and objectionable and subversive of good government. In any such system the judge is not recalled simply because of misconduct in office—for this may be accomplished by impeachment or removal after an opportunity to be heard—but because his decisions do not meet with popular approval. Stop for a moment and think of the situation where a judge is passing upon some question of the construction of the constitution, the power of the legislature to pass some law, or some executive act which is challenged as being in violation of the fundamental law of the land, and because he may have the courage to decide against what for the moment may be the popular view, the correctness of his legal judgment may be

tried in the uncertain tribunal of an election; that when a judge charges a jury or pronounces a judgment of the law between man and man it may be practically revised by the electors of his district. In our judgment such a course is but little short of submitting legal questions and the constitutional rights of the citizen to a vote of the people.

The question is not what should the constitution be—the people may change that—but shall the citizen be entitled to the protection of the constitution which has been adopted and remains unchanged? It is perfectly idle to say that this system would not take from the judiciary its self-reliance and self-respect. It is said that the judges should be subservient to the popular will. We do not deny that the judges should be alive to the great principles of human progress and development of government—that is one thing—but to decide from time to time what the popular will may demand is another thing. If the popular will or the will of the majority itself, suddenly expressed, is to be the absolute law of the land, why protect the people by constitutional provisions which mark down the limit of legislative and executive power? Why not leave it to the popular will as expressed from time to time?

Again, under the system of judicial recall, there is no possible way of insuring to the judge a trial by popular vote upon the issue thus raised. There is no evidence introduced, no rules which the experience of ages has found necessary to the determination of issues, but the voter may cast his ballot to recall the judge, from prejudice, from a desire to elect some one else, for political reasons, or for any reason which may actuate him at the time, and the judge be thus recalled, his office degraded, his reputation ruined, with no opportunity for a trial of the charges which have been preferred against him except to appeal to the electors, through the press, or take the stump in his own defense, in which case he might be called upon to defend the correctness of his legal decisions before the electors of his district.

The advocates of this system claim that it is in the interest of the common people. This we deny. For more than three hundred years the greatest bulwark for the protection of the mass of the people has been the courts.

There never was a time in our country when any man, however poor or humble, could not apply to the courts and be assured of protection. Is it any reproach upon the courts that they have extended the same protection to the rich and powerful, when assailed by popular prejudice? The same law which would deny protection to the rich or confiscate the property of corporations, might take the cottage or the liberty of the humblest citizen. You cannot attack the courts, and take from them the independence of judges, without endangering the foundations of personal security.

Recall of Judges: Argument in Opposition Presented before the Minnesota State Bar Association, Duluth, July 19, 1911.

Rome G. Brown.

Prior to the eighteenth century, the King of England had the arbitrary power of unseating a judge; but that power was taken away by the Act of Settlement passed eighty-seven years before the Constitution of the United States was framed. Prior to that, in England, the tyranny of monarchy extended to the judicial office; but ever since then the tenure of office of English judges has been during good behavior, removable only upon the address of both houses of Parliament. This is equivalent to our impeachment by the legislature. Although under despotisms and monarchies, the power of the recall of judges has in many instances been retained by the executive, there is no instance, so far as I am able to find, where ever, since most ancient times, under any government, either republican or democratic in form, the judicial recall by a popular vote has prevailed. Even in Switzerland, where there are no constitutional limitations upon legislation, and where the powers of legislation lie directly with the people, and that, too, by direct vote, the tenure of office and the independence of the judiciary are carefully protected. For over 2,000 years, the peoples of all republics have recognized the evils and the dangers of the tyranny of democracy as even more destructive of the integrity of the judiciary, than any tyranny of a monarchial sovereign wielding the power of

judicial recall. Not until these late years of the 20th century in our own country, do we find such a measure advocated, and that, too, in what has been assumed to be the most advanced and civilized republic which has ever been established.

Since the constitutional amendment of 1908, the Recall of Judges is provided in Oregon. It was only a short time ago that an Oregon judge, sitting in the trial of a man charged with murder, who was defending upon the plea of self-defense, instructed the jury that if certain facts had been shown they would constitute in law a justification. The jury found the facts, and followed the instruction of the judge as to the law. The correctness of the instruction is a fairly debatable one, but local prejudice had demanded the conviction of the accused, and on account of his acquittal a cry went up among the voters that the power of recall must be exercised, and a petition was immediately started to get the necessary signatures of 25 per cent. of the voters of the judicial district. It matters not what success the petition shall have, the fact of the attempt to exercise the recall power under the circumstances stated, is a demonstration of the tyrannical nature of the power of popular recall and of its possible abuse when applied to the judiciary.

In California and Nevada, constitutional amendments have recently been proposed by the legislature and are now before the people, containing similar provisions; and a legislative act has just been passed in California which in terms provides for the recall of county judges.

The constitution of the proposed new state of Arizona, now before Congress, has the same provision. Indeed, a bill has been introduced in the United States Senate by Senator Owen of Oklahoma, providing for the recall of any judge of the United States Supreme Court, or any federal court, by a resolution of Congress, without a hearing, and for the election of the federal, district and circuit judges by the voters of the district or circuit, with a tenure of office limited to four years. Senator Owen is denominated in politics a "progressive." There is another measure pending in Congress, characteristic of this so-called "progres-

sive" movement, and worthy of many of those who favor the judicial recall, because it strikes at the very foundation of the judicial department and attempts to deprive the judiciary of its most essential function, the safeguarding of constitutional rights. In terms, it gives to voters directly the power to enact and to compel the enforcement of statutes, state and federal, which are repugnant to the very constitutional provisions and limitations which were reserved for the protection and safeguarding of personal and property rights. I refer to the bill introduced in Congress by Mr. Berger, the Socialist representative from Wisconsin, providing for pensions to every person in the United States who, having been a citizen sixteen years, is more than sixty years old. The bill contains a provision specifically forbidding the United States Supreme Court from passing upon its constitutionality. However futile, however impossible such legislation, the fact that the voters of any Congressional district like that of Representative Berger, or that the state-wide constituents of any Senator, as in the case of Senator Owen, should select as their representative a person capable of even proposing such legislation, is proof conclusive that, however wisely the judicial recall by the people might be used in some parts of the country, yet its establishment in any particular state would only be brought about by those who would strike down the judicial office and give to the people of the locality in question the power to compel enforcement of legislative acts which are unconstitutional. Its effect in any particular locality where it prevails, is a wiping out of all constitutional limitations, and a return to the tyranny of democracy.

It is assumed by many advocates of this measure that the power of judicial recall by the people is not necessarily an arbitrary one, and that the elements of cause and of the consideration and even trial of issues may be preserved. In other words, they assume that it does not involve necessarily an elimination of the protections to the office of judge, and to the independence of any judicial incumbent, which usually exist by virtue of the provisions for impeachment for cause after charges preferred, and a hearing and adjudication by a senate or other tribunal authorized for that pur-

pose. They urge that the right of recall may be limited to specified causes such as malfeasance or improper behavior. Such suggestions are absolutely inconsistent with the very nature of the power given by the popular recall. This is shown not only by a most cursory consideration of the matter, but by the express terms of the powers which have been arrogated to the people with reference to the judicial recall, wherever that power has been in terms given.

In Oregon, the provision is that at any time after six months incumbency the judge may be compelled to go to a vote of the people of his district upon petition signed by twenty-five per cent of his constituent voters, and that upon the ballot the petitioners may state in 200 words the grounds claimed for his removal; and upon the same ballot, in not more than 200 words, the judge may answer the charge.

It is evident that even in form and theory this pretended opportunity to be confronted with charges and to make defense is a mere farce. It is, in fact, a farce. In the case of the Oregon judge, already mentioned, the Attorney General held that the charges contained in the recall petition, and shown upon the ballot in 200 words, need not be specific; and that it was sufficient if, as in that case, they comprised a mere collection of epithets applied to the judge complained of,—“incompetent,” “unfair,” and the like.

The California provision is substantially the same, except that only twenty per cent of the voters are required upon the recall petition. The Arizona proposed constitution contains the same provision as Oregon, except that the judge attacked has the privilege of resigning in five days after the recall petition is filed. It is manifestly impossible to provide, in connection with the popular recall, any special tribunal for the adjudication of questions of either fact or law which must be involved. In any attempt to unseat a judge, the first, the last and the only adjudication is by the people, and that, too, with only the merest pretense of the preferment of charges or of an opportunity to answer. The element of a hearing is entirely absent; there is no adjudication, for no opportunity is afforded to present evidence. All the essential elements of a trial are lacking. The decision is inevitably an arbitrary one made by the people

Indirectly, and, so far as such decision is based upon anything, it must be based upon that which is not evidence and must be governed by the hue and cry, by rumor, by misunderstanding and ignorance. The power of judicial recall, when exercised by the people directly at a popular election, can never be anything other than a purely arbitrary power, and accompanied by all the injustice, evils and disasters which inevitably result from unguarded and unrestrained authority.

Keeping in mind that such is the character of the power involved in the judicial recall, it is easily demonstrated that such a measure is (1) unwise and inexpedient; and (2) that it is repugnant to the federal constitution and inconsistent with our republican form of government.

The proposition of the judicial recall would violate another vital and fundamental rule which is the basic element of everything judicial. It is an arbitrary power, against a person in office, exercised against the object of its attack without allowing to him the privilege of being confronted with charges or the privilege of a hearing. I have already shown the futility of any attempt to make the power of judicial recall any other than a purely arbitrary one. It involves not only the abolishment of the form which at the present time is provided for impeachment after charges preferred, and trial and adjudication before a proper tribunal, but it necessarily involves the abolishment of the very substance, idea and spirit of such proceeding.

The judicial recall is in conflict with every fundamental principle of our government. The basic purposes and object of the judiciary are that the members of the court pass judgment only after issue is joined, with a hearing upon the facts, and then only upon and consistently with the elementary principles of personal and property rights expressly guaranteed by the fundamental law; and, further, that no member of the judicial tribunal should be influenced in any degree by outside considerations, whether in advance of, or during, or after the hearing; and that, without prejudice, and uninfluenced by any ulterior considerations, as to past, present and future, he should, in his conclusions of law, apply the law to the facts, with due regard to the

constitutional guaranties, and without fear or favor or any predetermination as to the result, and that his final adjudication should be an order or decree, logically and consistently following from the facts and the conclusions of law impartially found. The judicial recall, as thus far attempted to be applied in this country, means that a judge may be immune from unwarranted attacks upon his integrity for the first six months of his incumbency, but that at the expiration of that period he shall be accountable for all his official acts, not to his conscience, not to a tribunal who shall adjudicate after a hearing, but to that portion of the voters who for the time being may constitute the voting majority, and who may momentarily be induced, arbitrarily and without a hearing, to express a choice that he be called from the bench, in order, perhaps, that a pre-committed substitute may be placed in his stead. Thus the judicial recall not only destroys the independence of the judiciary, but in fact it destroys entirely the judiciary itself.

There are further objections based upon the ground of policy. It discourages lawyers possessing high attainments or a deep sense of professional ethics, from accepting positions upon the bench. It tends to lower and must necessarily lower the judicial standard. No lawyer qualified for a judge would allow himself to be put into the position where as judge he must either decide a case contrary to his conscience, or suffer the disgrace of a recall. No man worthy of a judgeship would be willing to be tried and convicted by public clamor without an opportunity to be heard.

Moreover, the judicial recall cannot tend to eliminate corruption in the judicial office, but would rather tend to increase it. It is not a cure for corruption. The judge who is recalled for actual corruption will always, so far as the public records are concerned, remain upon a par with the one who is recalled because of a correct decision which happens at the time to be unpleasant to the multitude. The protection of a hearing upon charges preferred, is not vouchsafed to either.

Neither will it prevent or diminish the so-called corporate control of the judiciary. The liability of the interven-

tion of outside influences is greater as the term of the judicial office is diminished. If, in any locality, corporate interference in politics is practiced, the judicial recall would only facilitate the tendency and power of corporate control. It would not, in many judicial districts, take great management nor much expenditure to obtain the signatures of 20 or 25 per cent of the voters, and to keep up a hue and cry so that at the polls the very indictment which has been made by the mere filing of the recall petition should be taken by a majority of the voters as sufficient proof that, at least, there ought to be a change.

Again, the recall of judges deprives them of that protection in the performance of their official duties which is necessary to the preservation of their independence and which is essential to their judicial function. The judiciary cannot protect constitutional rights when the judiciary itself is not protected under the constitution.

It is said that the recall will bring and keep the judicial office and the judge nearer to the people. This is true only in a sense that it tends to compel the judge to keep constantly dependent upon the changing whims of the people and compel him at any and all times to follow, under threat of recall, any demand which the majority may be willing to make that the constitutional barriers between valid and invalid legislation be broken down. It tends to pull him down from his high office and make him a mere servant, even a spokesman, of the majority, for the time being, of the voters of his district. Under such a system, public respect for the judge, which is one of the most important essentials of his office, is destroyed. He sits subject to the popular recall, at all times menaced with the threat that his ruling and judgments, however conscientious, however correct, may at any time, if he happen to meet the disfavor of the community, bring upon him the disgrace of a sudden and arbitrary retirement.

The attempted answer has been put forth, that if judges are recalled unjustly, history will vindicate them. No better answer could be made to this, than that made by Representative Hamilton of Michigan, the other day, in discussing the Arizona matter in Congress, when he said: "A good

many monuments have been erected to martyrs out of the stones wherewith they were stoned. But what do dead men care for monuments?"

The judicial recall is, therefore, unwise and inexpedient. It takes away every essential feature of the judicial office. It destroys its independence. It prevents entirely the exercise of the judicial function of maintaining and enforcing the constitutional protection guaranteed to every individual in his person and property. It makes him the mere servant or spokesman of a temporary majority. It opens the way for arbitrary disregard and practical annulment of constitutional provisions without amendments in the proper and prescribed manner. It does away with the judicial department of the government of any state or locality in which it is or may be exercised.

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Recall of Judges. Albert Fink.

The constitution adopted by Arizona provides for the recall of the judges. In California the Legislature has proposed an amendment to the State constitution calculated to accomplish a like result. This will meet the approval of the present Executive and be submitted to the people for acceptance or rejection at an election to be held for this purpose in September or October of this year. Present indications are that it will carry and thus become a part of the organic law of that state.

This principle in the science of government has never received the test of actual trial and its beneficial or pernicious influence rests upon speculative reasoning rather than upon any facts to be gathered from experience.

It would seem wise to remember the words of Mr. Lincoln:

"I do not mean to say we are bound to follow implicitly in whatever our fathers did. To do so would be to discard all the lights of current experience—to reject all progress, all improvement. What I do say is that if we would supplant the opinions and policy of our fathers in any case, we should do so upon evidence so conclusive and argument so clear that even their great authority fairly considered and weighed cannot stand."

Nowadays we take too much for granted. Lulled to sleep by the unparalleled prosperity we have enjoyed under the Constitution given us by the Fathers, we are prone to believe that human rights and liberties have become so secure as to be in no further need of protection either from the tyranny of a dictator or from that of an unrestrained democracy. Seeing in our path certain resultant evils of our very prosperity, we would, in a sudden moment, lay rude hands upon that instrument under which all this progress has been made possible without pausing to reflect that the evils might be eliminated without recourse to a change in the Constitution: and that by the later experiment though the evils might be curtailed, the prosperity might be lost. One of our most distinguished citizens is reported to have said that "republics are still upon trial."

The complete and absolute independence of the judiciary was a political maxim of the period during which the Constitution was adopted. It was just as much an essential principle of a republican form of government as the representative scheme. It is sometimes said that the principle was that there was and should be a severance between the executive, legislative, and judicial branches of government. But the statement, is, to a certain extent, inaccurate. The underlying principle was the independence of each. The severance was but the means to secure and enforce the principle. Than this principle of independence, none was more fully or firmly established in the science of government. It stood unchallenged. It had long been recognized in England, where though it was at first believed that the tenure of judges was at the pleasure of the Crown and that they were removable at the whim of the sovereign, this opinion had gradually changed, so that by the end of the sixteenth century the independence of the judiciary was becoming a recognized principle of the Constitution. And it was the violation of this theory as much as any other one thing, and his attempted debasement, to mere creatures of the Crown, of the judges of King's Bench, that cost Charles the First his head.

That this principle, or rather the means to enforce it,

was well recognized in this country cannot be doubted. It was embodied in several of the State constitutions.

That of Maryland provided in the Declaration of Rights:

"That the legislative, executive, and judicial powers of government ought to be forever separate and distinct from each other."

That of New Hampshire provided:

"In the government of this State the three essential powers thereof—to wit, the legislative, executive, and judicial, ought to be kept as separate from and independent of each other as the nature of a free government will admit."

By that of Virginia and Georgia it was provided:

"The legislative, executive and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other."

To remove the judiciary beyond the possible control of a temporary majority, it was provided in each of the thirteen colonies, except Georgia, that the judges be appointed.

Taking the best that existed both in American and English precedents, the same principle was carried into the Federal Constitution, where good behavior was made the tenure and the judges selected by appointment. And in the convention Dickenson, while agreeing that the terms of the judges should be during good behavior, thought they should be removable by the Executive upon the address of the Senate and House of Representatives, after the manner prevailing in England; but Gouverneur Morris pointed out that such power of removal without trial united with a tenure of office during good behavior would be a contradiction in terms.

In an instrument where almost every phrase of its proper or possible construction was examined, analyzed, disputed, and debated, from Henry's objections to the use of the phrase "We people," to Martin's criticisms of the abolition of religious tests, it is interesting to note that the provision with reference to the selection and tenure of the judges was agreed to without a dissenting voice. What ever conflict may have existed upon other points, it is clear that in republican government an independent judiciary as a cardinal and essential principle was a proposition agreed to by all.

From these considerations it would seem to appear that at the time of the adoption of the Federal Constitution an independent judiciary was universally considered

essential to a republican form of government. To attain and safeguard this two corollary principles were adopted. Pressing forward the precedent then in existence in England and following that of each of the thirteen colonies, there was a severance of the judicial from the other branches of government. And adopting the rule then prevalent in England, and the colonies other than New Jersey and Pennsylvania, the tenure was made during good behavior.

While the States reserved to themselves all the powers not granted to the general government, and while the general government has only delegated powers and such powers as are necessary to the enjoyment of those delegated, the right of the several States to so change, modify, or amend their systems as to make them other than republican in form is one which they have relinquished and the authority of the general government to guarantee to the several States a republican form of government is a power which has been transferred to it by each of the States and such a power as carries with it all powers necessary to its enforcement.

But what are the tests? By what standard is any particular principle to be measured? In what scales are any proposed changes or modifications to be weighed? And who is to be the ultimate judge? These questions, it is believed, are not so difficult as they appear. As before pointed out, the standard is to be that which existed at the time of the adoption of the Constitution. The scales will be found in the opinions and contemporaneous precedents of the same period. The test is to be this: Was the principle embodied in the proposed change one which at the time of the adoption of the Constitution was accepted as one of the cardinal and necessary elements of a republican form of government without which such form could not well exist? If so, then it is one of the essentials of such a form of government and must not be violated. The independence of the judiciary is believed to be such a principle.

That the recall of the judges not only tends to weaken their necessary independence, but is directly destructive thereof, can be easily demonstrated. Such a measure would place the judges and a majority of the electorate in the rela-

tion to each other of master and servant. When such a relationship exists and is determinable at the will of the master the servant is without independence. He must obey, not the dictates of his own conscience, but the arbitrary will of his employer, upon penalty of the immediate determination of the relation. The case is otherwise if the relation is to exist for a given time; then the servant so long as he performs his duty is protected from any unjust or arbitrary demands.

The election of judges for stated terms lessens their independence of a majority as their terms of office draws to a close. The power of their immediate recall destroys their independence. As it would be in the teeth of human nature to expect a servant desirous of continuing his employment to disobey the imperative commands of his master, so it would indeed be requiring too much of a judge, who desired to continue in office, to expect him to render an unpopular decision or one which he believed to be such.

Nor is the measure capable of justification upon the argument of its advocates. Their whole theory of right lies in the following reasoning:

"The people are supreme. What they will is law. The judges are the servants of the people, employed by the latter, and holding office at their will. Therefore, the master, the people, has the inherent right to discharge the servant, the judges, at pleasure."

The conclusion would seem logically to flow from the premises. Nor it is with the former so much as with the latter that the fault lies. When it is said that the people are supreme, that they employ the judges and stand toward them in the relation of a master to a servant, what is meant is the majority of the people. Herein lies the error. The judges are not the servants and agents of the majority. The judges are the servants of both the majority and the minority and must of necessity be independent of each.

Any rule of might is a tyranny whether it be in the form of an emperor, dictator, oligarchy, or democracy. The unrestrained rule of the majority is as objectionable as that of an individual; it is more so, because it has all the

evils of the former with none of the efficiency of the latter. This country is ruled by laws and not by majorities. True, the laws are made by majorities, but there are limits beyond which they may not go. Every citizen has certain inherent and fundamental rights which can be taken from him neither through legislative enactments nor by constitutional amendments supported by no matter how great a majority.

Life, liberty, and the pursuit of happiness, the right of contract and private ownership of property, when not used to the detriment of others, of procreation, of inviolability of persons and family—such rights as these are not justly dependent for protection upon constitutions, they are fundamental, inherent. Without their adequate protection no government can long exist. Certainly no majority, however great, has the right to single out the individual and take from him these inherent rights.

It is one of the peculiar functions of a judge in a State governed by laws and not by men to protect the minority or the individual, as the case may be. Though chosen by the majority or by some person or persons to whom the power of selection has been delegated, they cease, upon induction into office, to become the mere servants at will of those by whom they were selected, nay they never were their servants. The right of selection in no sense carries with it such right of domination as was attempted by Charles I. Upon selection the judges become the servants of the whole people, not of the majority or class by whom they may have been chosen. They represent the minority, the weakest class in society: the humblest individual, just as much as the dominant political party, the laboring or moneyed classes, or the most potent members of the community. During their term of office they are justly answerable to no one.

A powerful minority may well trust the selection of the judge to a majority, but the domination of this majority after selection is quite another matter. This is tyranny and, as Montesquieu says, "the end of all things." Such a practice when taken advantage of by majorities, as it inevitably must be, can be maintained only by arms, and this power does not always lie in majorities.

Nor can any justification of the proposed measure be found in the doctrine of expediency. *In limine* let it be inquired, what will be accomplished by the proposed change that is deemed expedient?

Will the respect of the community for the judges, a situation so earnestly to be sought, be increased? Already there has appeared a very wide discrepancy in the esteem entertained by the general public for the State tribunals by reason of the selection of their judges for short terms.

Will the proposed measure induce gentlemen of greater attainments to seek election to the bench? It is believed such will not be the case. What man worthy of the name would submit himself to the alternative of deciding a cause contrary to his conscience or suffering the disgrace of a peremptory recall by his fellow citizens? How can an increase of wholesome respect be attained by a further curtail of that independence, the want of which has already induced disparagement?

Will the corruption charged to exist be eliminated? Where is his corruption? Is there no evidence available? Then, is it the purpose to convict judges without evidence? Is suspicion to take the place of facts? Surely this would seem to be a novel American idea.

Will the alleged corporate control of the judiciary be abolished? Where does it exist today? In the Federal or the State tribunals? Certainly from the recent decisions of the former it does not seem to be there entrenched to any great extent. If in the latter, how will the evil be remedied? The judges are now selected by the majority of the people. If they are now unable to select judges free from corporate influence, may we expect a resultant improvement in the exercise of choice by conferring the power of recall? Why?

How is the fact of a leaning of the judge toward corporate interests to be ascertained? Is it to be based upon errors appearing in his judgments or is it to rest solely upon the fact that the decision was in favor of the corporation? If the former, who is to judge of the existence of the error? The lawyers who lost the case or those who won? As in any other branch of science, the opinion only of the educated therein will be worthy of consideration.

Whose interpretation will be accepted? If the latter, why not proceed at once to the division of corporate property without pursuing the tedious process suggested?

Are the opinions of experts upon the expediency of this measure desired? If there is one man to whom more than any other this age owes a debt of undying gratitude for the preservation of the republic when others in the blindness of political fury were contending for principles which would have guaranteed its early dissolution, that man is John Marshall.

When his inspiring career was drawing near to its close he was persuaded to become a member of the Virginia Constitutional Convention of 1829. This was a remarkable assembly. It was presided over by James Monroe, escorted to the chair by Madison and Marshall. Party spirit ran high. Passions were much inflamed. One of the principal questions presented was the tenure by which judges should hold office. Marshall was at this time in his seventy-fifth year. For nearly a third of a century he had occupied the high position of Chief Justice. He had considered all manner of causes; he had observed all manner of men. Soldier, lawyer, statesman, diplomat, patriot, and himself the greatest judge with which Almighty God had ever adorned a bench or blessed a country, who than Marshall knew better whereof he spoke?

With that great earnestness which had ever characterized his life he said:

"The argument of the gentleman goes to prove not only that there is no such thing as judicial independence but that there ought to be no such thing; that it is unwise and improvident to make the tenure of the judge's office to continue during good behavior. Advert, sir, to the duties of a judge. He has to pass between the government and the man whom that government is prosecuting—between the most powerful individual in the community and the poorest and most unpopular. It is of the last importance that in the performance of these duties he should observe the utmost fairness. Need I press the necessity of this? Does not every man feel that his own personal security and the security of his property depend upon that fairness? The judicial department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not to the last degree important that he should be rendered perfectly and completely independent with nothing to control him but God and his conscience? . . . I acknowledge that in my judgment the whole good which may grow out of this convention, be it what it may, will never compensate for the evil of changing the judicial tenure of office. . . I have always thought from my earliest youth till now that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people was an ignorant, and corrupt, or a dependent judiciary."

That the proposed measure is at best a mere experiment in government will be admitted. Going, as it does to the very root of what is believed to be one of the essentials of free institutions, it must be conceded to be a most dangerous one. To many it seems pernicious—a step in the very opposite direction from those safeguards, checks, and balances believed to be so necessary to protect the whole people from the sudden and violent turbulence of a temporary majority. It has been well said: "Popular sentiment is proverbially variable and is subject to constant alterations; today the multitude cry 'Hosanna!' and tomorrow 'Crucify Him!'"

The situation could not be better described than in the words of Aristotle:

"The people, who is now a monarch and no longer under the control of law, seeks to exercise monarchical sway and grows into a despot; the flatterer is held in honor, this sort of democracy being relatively to the other democracies what tyranny is to other forms of monarchy. The spirit of both is the same and they alike exercise a despotic rule over the better citizens. The decrees of the demos correspond to the edicts of the tyrant; and the demagogue is to the one what the flatterer is to the other. Both have great power—the flatterer with the tyrant; the demagogue with democracies of the kind we are describing. The demagogues make the decrees of the people override the laws and refer all things to the popular assembly. And, therefore, they grow great, because the people have all things in their hands, and they hold in their hands the votes of the people who are ready to listen to them. Further, those who have any complaint to bring against the magistrates say, 'Let the people be judges'; the people are too happy to accept the invitation and so the authority of every office is undermined. Such a democracy is fairly open to the objection that it is not a constitution at all, for where the laws have no authority there is no constitution."

Surely, if a change is to be made in the existing system prevalent in the vast majority of States, it would seem it should be in the direction of granting to the judges a greater independence of spirit, thereby lifting them to the plane of high efficiency now occupied by the Federal judiciary rather than a still further wholly useless and unnecessary debasement.

RECALL OF JUDICIAL DECISIONS

AFFIRMATIVE DISCUSSION

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Charter of Democracy. Theodore Roosevelt.

An independent and upright judiciary which fearlessly stands for the right, even against popular clamor, but which also understands and sympathizes with popular needs, is a great asset of popular government. † There is no public servant and no private man whom I place above a judge of the best type, and very few whom I rank beside him. † I believe in the cumulative value of the law and in its value as an impersonal, disinterested basis of control. † I believe in the necessity for the courts' interpretation of the law as law without the power to change the law or to substitute some other thing than law for it. † But I agree with every great jurist, from Marshall downwards, when I say that every judge is bound to consider two separate elements in his decision of a case, one the terms of the law, and the other the conditions of actual life to which the law is to be applied. Only by taking both of these elements into account is it possible to apply the law as its spirit and intent demand that it be applied. Both law and life are to be considered in order that the law and the Constitution shall become, in John Marshall's word, "a living instrument and not a dead letter." Justice between man and man, between the state and its citizens, is a living thing, whereas legalistic justice is a dead thing. Moreover, never forget that the judge is just as much the servant of the people as any other official. Of course he must act conscientiously. So must every other official. He must not do anything wrong

because there is popular clamor for it, any more than under similar circumstances a governor or a legislator or a public utilities commissioner should do wrong. Each must follow his conscience, even though to do so costs him his place. But in their turn the people must follow their conscience, and when they have definitely decided on a given policy they must have public servants who will carry out that policy.

Keep clearly in mind the distinction between the end and the means to attain that end. Our aim is to get the type of judge that I have described, to keep him on the bench as long as possible, and to keep off the bench and, if necessary, take off the bench the wrong type of judge. In some communities one method may work well which in other communities does not work well, and each community should adopt and preserve or reject a given method according to its practical working. Therefore the question of applying the recall in any shape is one of expediency merely. Each community has a right to try the experiment for itself in whatever shape it pleases. Under the conditions set forth in the extract from the letter given above, I would personally have favored the recall of the judges both in California and in Missouri; for no damage that could have been done by the recall would have equalled the damage done to the community by judges whose conduct had revolted not only the spirit of justice, but the spirit of common sense. I do not believe in adopting the recall save as a last resort, when it has become clearly evident that no other course will achieve the desired result. But either the recall will have to be adopted or else it will have to be made much easier than it now is to get rid, not merely of a bad judge, but of a judge who, however virtuous, has grown so out of touch with social needs and facts that he is unfit longer to render good service on the bench. It is nonsense to say that impeachment meets the difficulty. In actual practice we have found that impeachment does not work, that unfit judges stay on the bench in spite of it, and indeed because of the fact that impeachment is the only remedy that can be used against them. Where such is the actual fact it is idle to discuss the theory of the case. Im-

peachment as a remedy for the ills of which the people justly complain is a complete failure. A quicker, more summary, remedy is needed; some remedy at least as summary and as drastic as that embodied in the Massachusetts Constitution. And whenever it be found in actual practice that such remedy does not give the needed results, I would unhesitatingly adopt the recall.

But there is one kind of recall in which I very earnestly believe, and the immediate adoption of which I urge. There are sound reasons for being cautious about the recall of a good judge who has rendered an unwise and improper decision. Every public servant, no matter how valuable, and not omitting Washington or Lincoln or Marshall, at times makes mistakes. Therefore we should be cautious about recalling the judge, and we should be cautious about interfering in any way with the judge in decisions which he makes in the ordinary course as between individuals. But when a judge decides a Constitutional question, when he decides what the people as a whole can or cannot do, the people should have the right to recall that decision if they think it wrong. We should hold the judiciary in all respect; but it is both absurd and degrading to make a fetish of a judge or of any one else. Abraham Lincoln said in his first inaugural: "If the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal. Nor is there in this view any assault upon the courts or the judges." Lincoln actually applied in successful fashion the principle of the recall in the Dred Scott case. He denounced the Supreme Court for that iniquitous decision in language much stronger than I have ever used in criticising any court, and appealed to the people to recall the decision—the word "recall" in this connection was not then known, but the phrase exactly describes what he advocated. He was successful, the people took his view, and the decision was practically recalled.

Under our Federal system the remedy for a wrong such as Abraham Lincoln described is difficult. But the remedy

is not difficult in a state. What the Supreme Court of the Nation decides to be law binds both the national and the state courts and all the people within the boundaries of the Nation. But the decision of a state court on a Constitutional question should be subject to revision by the people of the state. Again and again in the past justice has been scandalously obstructed by state courts declaring state laws in conflict with the federal Constitution, although the Supreme Court of the Nation had never so decided or had even decided in a contrary sense. | When the Supreme Court of the state declares a given statute unconstitutional, because in conflict with the state or the national Constitution, its opinion should be subject to revision by the people themselves. | Such an opinion ought always to be treated with great respect by the people, and unquestionably in the majority of cases would be accepted and followed by them. But actual experience has shown the vital need of the people reserving to themselves the right to pass upon such opinion. If any considerable number of the people feel that the decision is in defiance of justice, they should be given the right by petition to bring before the voters at some subsequent election, special or otherwise, as might be decided, and after the fullest opportunity for deliberation and debate, the question whether or not the judges' interpretation of the Constitution is to be sustained. If it is sustained, well and good. If not, then the popular verdict is to be accepted as final, the decision is to be treated as reversed, and the construction of the Constitution definitely decided—subject only to action by the Supreme Court of the United States.

Many eminent lawyers who more or less frankly disbelieve in our entire American system of government for, by, and of the people, violently antagonize this proposal. They believe, and sometimes assert, that the American people are not fitted for popular government, and that it is necessary to keep the judiciary "independent of the majority or of all the people;" that there must be no appeal to the people from the decision of a court in any case; and that therefore the judges are to be established as sovereign rulers over the people. The only tenable excuse for such a

position is the frank avowal that the people lack sufficient intelligence and morality to be fit to govern themselves. In other words, those who take this position hold that the people have enough intelligence to frame and adopt a Constitution, but not enough intelligence to apply and interpret the Constitution which they have themselves made. Those who take this position hold that the people are competent to choose officials to whom they delegate certain powers. Now the power to interpret is the power to establish; and if the people are not to be allowed finally to interpret the fundamental law, ours is not a popular government. The true view is that legislators and judges alike are the servants of the people, who have been created by the people, just as the people have created the Constitution; and they hold only such power as the people have for the time being delegated to them. If these two sets of public servants disagree as to the amounts of power respectively delegated to them by the people under the Constitution, and if the case is of sufficient importance, then, as a matter of course, it should be the right of the people themselves to decide between them. Just as the people, and not the Supreme Court under Chief Justice Taney, were wise in their decisions of the vital questions of their day, so I hold that now the American people as a whole have shown themselves wiser than the courts in the way they have approached and dealt with such vital questions of our day as those concerning the proper control of big corporations and of securing their rights to industrial workers.

Here I am not dealing with theories; I am dealing with actual facts. In New York, in Illinois, in Connecticut, lamentable injustice has been perpetuated, often for many years, by decisions of the state courts refusing to permit the people of the states to exercise their right as a free people to do their duty as a conscientious people in removing grave wrong and social injustice. These foolish and iniquitous decisions have almost always been rendered at the expense of the weak; they have almost always been the means of putting a stop to the effort to remove burdens from wage-workers, to secure to men who toil on the farm and on the railway, or in the factory, better and safer con-

ditions of labor and of life. Often the judges who have rendered these decisions have been entirely well-meaning men, who, however, did not know life as they knew law, and who championed some outworn political philosophy which they assumed to impose on the people. Their associations and surroundings were such that they had no conception of the cruelty and wrong their decisions caused and perpetuated. Their prime concern was with the empty ceremonial of perfunctory legalism, and not with the living spirit of justice. ¶ A typical case was the decision rendered but a few months ago by the Court of Appeals of my own state, the state of New York, declaring unconstitutional the workmen's compensation act. ¶ In their decision the judges admitted the wrong and the suffering caused by the practices against which the law was aimed. They admitted that other civilized nations had abolished these wrongs and practices. But they took the ground that the Constitution of the United States, instead of being an instrument to secure justice, had been ingeniously devised absolutely to prevent justice. They insisted that the clause in the Constitution which forbade the taking of property without due process of law forbade the effort which had been made in the law to distribute among all the partners in an enterprise the effects of the injuries to life or limb of a wage-worker. In other words, they insisted that the Constitution had permanently cursed our people with impotence to right wrong, and had perpetuated a cruel iniquity; for cruel iniquity is not too harsh a term to use in describing the law which, in the event of such an accident, binds the whole burden of crippling disaster on the shoulders least able to bear it—the shoulders of the crippled man himself, or of the dead man's helpless wife and children. No anarchist orator, raving against the Constitution, ever framed an indictment of it so severe as these worthy and well-meaning judges must be held to have framed if their reasoning be accepted as true. But, as a matter of fact, their reasoning was unsound, and was as repugnant to every sound defender of the Constitution as to every believer in justice and righteousness. In effect, their decision was that we could not remedy these wrongs unless we amended the Constitution

(not the Constitution of the State, but the Constitution of the Nation) by saying that property could be taken without due process of the law! It seems incredible that any one should be willing to take such a position. It is a position that has been condemned over and over again by the wisest and most far-seeing courts. In its essence it was reversed by the decision of the State courts in States like Washington and Iowa, and by the Supreme Court of the Nation in a case but a few weeks old.

I call this decision to the attention of those who shake their heads at the proposal to trust the people to decide for themselves what their own governmental policy shall be in these matters. I know of no popular vote by any state of the Union more flagrant in its defiance of right and justice, more short-sighted in its inability to face the changed needs of our civilization, than this decision by the highest court of the State of New York. Many of the judges of that court I know personally, and for them I have a profound regard. Even for as flagrant a decision as this I would not vote for their recall; for I have no doubt the decision was rendered in accordance with their ideas of duty. But most emphatically I do wish that the people should have the right to recall the decision itself, and authoritatively to stamp with disapproval what cannot but seem to the ordinary plain citizen a monstrous misconstruction of the Constitution, a monstrous perversion of the Constitution into an instrument for the perpetuation of social and industrial wrong and for the oppression of the weak and helpless. No ordinary amendment to the Constitution would meet this type of case; and intolerable delay and injustice would be caused by the effort to get such amendment—not to mention the fact that the very judges who are at fault would proceed to construe the amendment. In such a case the fault is not with the Constitution; the fault is in the judges' construction of the Constitution; and what is required is power for the people to reverse this false and wrong construction.

According to one of the highest judges then and now on the Supreme Court of the Nation, we had lived for a hundred years under a Constitution which permitted a

national income tax, until suddenly by one vote the Supreme Court reversed its previous decisions for a century, and said that for a century we had been living under a wrong interpretation of the Constitution (that is, under a wrong Constitution), and therefore in effect established a new Constitution which we are now laboriously trying to amend so as to get it back to be the Constitution that for a hundred years everybody, including the Supreme Court, thought it to be. When I was President, we passed a National Workmen's Compensation Act. Under it a railway man named Howard, I think, was killed in Tennessee, and his widow sued for damages. Congress had done all it could to provide the right, but the Court stepped in and decreed that Congress had failed. Three of the judges took the extreme position that there was no way in which Congress could act to secure the helpless widow and children against suffering, and that the man's blood and the blood of all similar men when spilled should forever cry aloud in vain for justice. This seems a strong statement, but it is far less strong than the actual facts; and I have difficulty in making the statement with any degree of moderation. The nine Justices of the Supreme Court on this question split into five fragments. One man, Justice Moody, in his opinion, stated the case in its broadest way and demanded justice for Howard, on the grounds that would have meant that in all similar cases thereafter justice and not injustice should be done. Yet the Court, by a majority of one, decided as I do not for one moment believe the Court would now decide, and not only perpetuated a lamentable injustice in the case of the man himself, but set a standard of injustice for all similar cases.

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Right of the People to Rule: Address at Carnegie Hall.

Theodore Roosevelt.

My opponents charge that two things in my programme are wrong because they intrude into the sanctuary of the judiciary. The first is the recall of judges; and the second,

the review by the people of judicial decisions on certain Constitutional questions. I have said again and again that I do not advocate the recall of judges in all states and in all communities. In my own state I do not advocate it or believe it to be needed, for in this state our troubles lie not with corruption on the bench, but with the effort by the honest but wrongheaded judges to thwart the people in the struggle for social justice and fair-dealing. The integrity of our judges from Marshall to White and Holmes—and to Cullen and many others in our state—is a fine page of American history. But—I say it soberly—democracy has a right to approach the sanctuary of the courts when a special interest has corruptly found sanctuary there; and this is exactly what has happened in some of the states where the recall of the judges is a living issue. I would far more willingly trust the whole people to judge such a case than some special tribunal—perhaps appointed by the same power that chose the judge—if that tribunal is not itself really responsible to the people and is hampered and clogged by the technicalities of impeachment proceedings.

I have stated that the courts of the several states—not always but often—have construed the “due process” clause of the state constitutions as if it prohibited the whole people of the state from adopting methods of regulating the use of property so that human life, particularly the lives of the workingmen, shall be safer, freer, and happier. No one can successfully impeach this statement. I have insisted that the true construction of “due process” is that pronounced by Justice Holmes in delivering the unanimous opinion of the Supreme Court of the United States, when he said:

“The police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.”

I insist that the decision of the New York Court of Appeals in the Ives case, which set aside the will of the majority of the people as to the compensation of injured workmen in dangerous trades, was intolerable and based on a wrong political philosophy. I urge that in such cases where the courts construe the due process clause as

if property rights, to the exclusion of human rights, had a first mortgage on the Constitution, the people may, after sober deliberation, vote, and finally determine whether the law which the court set aside shall be valid or not. By this method can be clearly and finally ascertained the preponderant opinion of the people which Justice Holmes makes the test of due process in the case of laws enacted in the exercise of the police power. The ordinary methods now in vogue of amending the Constitution have in actual practice proved wholly inadequate to secure justice in such cases with reasonable speed, and cause intolerable delay and injustice, and those who stand against the changes I propose are champions of wrong and injustice, and of tyranny by the wealthy and the strong over the weak and the helpless.

So that no man may misunderstand me, let me recapitulate:

(1) I am not proposing anything in connection with the Supreme Court of the United States, or with the Federal Constitution.

(2) I am not proposing anything having any connection with ordinary suits, civil or criminal, as between individuals.

(3) I am not speaking of the recall of judges.

(4) I am proposing merely that in a certain class of cases involving the police power, when a state court has set aside as unconstitutional a law passed by the legislature for the general welfare, the question of the validity of the law—which should depend, as Justice Holmes so well phrases it, upon the prevailing morality or preponderant opinion—be submitted for final determination to a vote of the people, taken after due time for consideration. And I contend that the people, in the nature of things, must be better judges of what is the preponderant opinion than the courts, and that the courts should not be allowed to reverse the political philosophy of the people. My point is well illustrated by a recent decision of the Supreme Court, holding that the Court would not take jurisdiction of a case involving the constitutionality of the initiative and referendum laws of Oregon. The ground of the decision was that such a question was not judicial in its nature, but

should be left for determination to the other co-ordinate departments of the government. Is it not equally plain that the question whether a given social policy is for the public good is not of a judicial nature, but should be settled by the legislature, or in the final instance by the people themselves?

The object I have in view could probably be accomplished by an amendment of the state Constitutions taking away from the courts the power to review the legislature's determination of a policy of social justice, by defining due process of law in accordance with the views expressed by Justice Holmes for the Supreme Court. But my proposal seems to me more democratic and, I may add, less radical. For under the method I suggest the people may sustain the court as against the legislature, whereas, if due process were defined in the constitution, the decision of the legislature would be final.

Mr. Taft says that the judiciary ought not to be "representative" of the people in the sense that the legislature and the executive are. This is perfectly true of the judge when he is performing merely the ordinary functions of a judge in suits between man and man. It is not true of the judge engaged in interpreting, for instance, the due process clause—where the judge is ascertaining the preponderant opinion of the people (as Judge Holmes states it). When he exercises that function he has no right to let his political philosophy reverse and thwart the will of the majority. In that function the judge must represent the people or he fails in the test the Supreme Court has laid down. Take the Workmen's Compensation Act here in New York. The legislators gave us a law in the interest of humanity and decency and fair dealing. In so doing they represented the people, and represented them well. Several judges declared that law constitutional in our state, and several courts in other states declared similar laws constitutional, and the Supreme Court of the Nation declared a similar law affecting men in inter-state business constitutional; but the highest court in the State of New York, the Court of Appeals, declared that we, the people of New York, could not have such a law. I hold that in this case the legislators and the

judges alike occupied representative positions; the difference was merely that the former represented us well and the latter represented us ill. Remember that the legislators promised that law, and were returned by the people partly in consequence of such promise. That judgment of the people should not have been set aside unless it were irrational. Yet in the Ives case the New York Court of Appeals praised the policy of the law and the end it sought to obtain; and then declared that the people lacked power to do justice!

Mr. Taft is very much afraid of the tyranny of majorities. For twenty-five years here in New York state, in our efforts to get social and industrial injustice, we have suffered from the tyranny of a small minority. We have been denied, now by one court, now by another, as in the bakeshop case, where the courts set aside the law limiting the hours of labor in bakeries—the “due process” clause again—as in the workmen’s compensation act, as in the tenement-house cigar factory case—in all these and many other cases we have been denied by small minorities, by a few worthy men of wrong political philosophy on the bench, the right to protect our people in their lives, their liberty, and their pursuit of happiness. As for “consistency”—why, the record of the courts, in such a case as the income tax for instance, is so full of inconsistencies as to make the fear expressed of “inconsistency” on the part of the people seem childish.

When, as the result of years of education and debate, a majority of the people have decided upon a remedy for an evil from which they suffer, and have chosen a legislature and executive pledged to embody that remedy in law, and the law has been finally passed and approved, I regard it as monstrous that a bench of judges shall then say to the people: “You must begin all over again. First amend your constitution (which will take four years); second, secure the passage of a new law (which will take two years more); third, carry that new law over the weary course of litigation (which will take no human being knows how long); fourth, submit the whole matter over again to the very same judges who have rendered the decision to which you object. Then, if your patience holds out and you finally pre-

vail, the will of the majority of the people may have its way." Such a system is not popular government, but a mere mockery of popular government. It is a system framed to maintain and perpetuate social injustice, and it can be defended only by those who disbelieve in the people, who do not trust them, and, I am afraid I must add, who have no real and living sympathy with them as they struggle for better things. In lieu of it I propose the practice by which the will of a majority of the people, when they have determined upon a remedy, shall, if their will persists for a minimum period of two years, go straight forward until it becomes a ruling force of life. I expressly propose to provide that sufficient time be taken to make sure that the remedy expresses the will, the sober and well-thought-out judgment, and not the whim, of the people; but, when that has been ascertained, I am not willing that the will of the people shall be frustrated. If this be not a wise remedy, let those who criticise it propose a wise remedy, and not confine themselves to railing at government by the mob. To propose, as an alternative remedy, slight modifications of impeachment proceedings is to propose no remedy at all—it is to bid us be content with chaff when we demand bread.

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New Method of Constitutional Amendment by Popular Vote.

William Draper Lewis.

The peculiar position of the judiciary in our constitutional system and the insistent demand for advanced economic legislation, has led in many instances to a conflict between the desires of the people and the decisions of the courts, especially some of the state courts, in respect to the constitutional right to enact what many consider much-needed legislation. These conflicts have led many to insist that the people shall have a right to recall, by popular votes, judges with whom they have become dissatisfied.

Colonel Roosevelt, on the other hand, has proposed that the people shall have what he terms a right to recall a certain class of decisions on state constitutional questions.

In discussing the wisdom of any proposition it is essential to get first a clear idea of exactly what the proposition is. The strong protest from many members of the legal profession against Colonel Roosevelt's plan is unquestionably in great part due to a misunderstanding of exactly what it is he proposes. What he does propose is this: If an act of the legislature is declared by the state courts to violate a provision in the state constitution, after an interval for deliberation, the people of the state shall have an opportunity to vote on the question whether they desire to have the act become a law in spite of the opinion of the court that it is contrary to the constitution.

Owing to his expression, "The Recall of Decisions," many persons have supposed that Colonel Roosevelt meant that the court's judgment in the case in which the act was held unconstitutional should be reversed; that the judgment in favor of the plaintiff! It is needless to point the defendant would, by the vote of a majority of the people of the state assembled in voting booths, be made a judgment in favor of the plaintiff! It is needless to point out the ridiculousness of such a proposition. Even if we can be so foolish as to suppose that any American commonwealth could be induced to adopt it, the provision would be, of course, unconstitutional under that clause of the fourteenth amendment of the federal constitution which provides that no state shall "deprive any person of life, liberty, or property without due process of law." As I shall have occasion presently to point out, the meaning of that clause has perhaps been somewhat extended in recent years; but no one now doubts that whatever else it means, it unquestionably prevents a judgment being entered in favor of one party or the other in a criminal or civil suit by any other tribunal than a court. If A makes a claim against B, which B denies, B has the right to have the question whether the claim of A can be enforced determined by a court. When a court determines that one party to a suit is entitled to a judgment in his favor under existing

law, constitutionally that judgment cannot be reversed except by a higher court, and whatever difficulty there may be in the accurate definition of the word "court," there is no question but that the voters of the state assembled in their respective voting precincts do not constitute a court. The plan proposed is not that the decision, meaning the judgment in the case, shall be recalled, but that the decision, meaning the opinion of the court that the act is contrary to the constitution, shall be so far recalled, that, after an affirmative vote by the people in favor of the act, the court cannot in a subsequent case declare that the act is valid.

As thus explained, the real issue presented by the proposition of Colonel Roosevelt is whether this new method of amending *pro tanto* the state constitution has practical advantage in view of the methods now in force. Or, to put the matter in another way: While the explanation of the real nature of the proposition deprives it of all revolutionary aspect, is there any practical necessity for it? I shall try to answer this question.

The provisions of our state constitutions may be divided into two classes. First, there are those which deal with specific subjects. A single example will suffice. The Constitution of the State of Pennsylvania provides that "No act of the general assembly shall limit the amount to be recovered for injuries resulting in death or for injuries to persons or property." Here we have a definite provision dealing with a specific subject. There is no possibility of misunderstanding its meaning and therefore practically no room for a difference of opinion as to its application. In view of it the State of Pennsylvania cannot now pass a compulsory workmen's compensation act, the essential elements of such an act being that the plaintiff, irrespective of the negligence of the defendant, recovers a definite sum of money, while all rights under the existing law of negligence are abrogated. As applied to this concrete provision of the constitution, or to any similar specific provision, it may be freely admitted that Colonel Roosevelt's suggestion has no importance.

Another and important class of provisions in state constitutions is those which enunciate general principles, of

which by far the most important and indefinite is the one which in one form or another expresses the idea that no one shall be deprived of his liberty or property without due process of the law. Originally, as in the fifth amendment to the federal constitution, this provision probably merely meant that no one should be deprived of his liberty or property by the arbitrary action of the executive arm of the government. This, however, is a question on which students of our history may reasonably differ. There is no doubt, however, that to-day, under the decisions of the courts, whatever it originally meant, it now means:

First.—That the procedure by which a person is deprived of his liberty or what he claims to be his property, shall be “due” in accordance with the fundamental ideas of judicial procedure prevalent among English-speaking people.

Second.—That an act of the legislature is void which violates fundamental ideas of morality and social justice.

The most difficult of human problems is the adjustment of the economic liberty of the individual with necessary governmental regulation and action. The freedom of the individual is still as always essential to progress. On the other hand, it is also essential to progress that the people collectively by governmental regulation and action preserve and create conditions which tend to conserve and develop, not only the natural resources of the country, but the human resources,—the men, the women and the children. An act which limits the freedom of contract, or the use to which private property may be put, is usually spoken of as a police act; or an act passed under the police power of the state. If the act limits the freedom of the individual in a wholly unnecessary manner it violates “fundamental ideas of social justice,” and the courts will declare it unconstitutional under the due process of law clause. In so doing, of necessity, the judges must determine whether the act in question does or does not violate fundamental ideas of social justice. But ideas of morality and social justice change with changing social and economic conditions. A regulation of persons or property which is arbitrary and unfair to one generation is not necessarily arbitrary and unfair to another. When, therefore, an act is attacked be-

fore a court as arbitrary or unfair, and therefore as depriving persons of their liberty or property without due process of law, the court is confronted with the question of the standard by which they shall test the question presented: shall they test the act by the ideas prevalent in the past or by the ideas prevalent to-day? The courts have not given a clear answer to this question, and yet on the answer depends the usefulness of the functions performed by the courts in this class of cases. If the courts continually declare acts which are in accord with modern ideas of social justice, unconstitutional because they violate some outworn system of political economy, they become intolerable clogs on the orderly solution of present social and economic problems. On the other hand, if they only declare unconstitutional, under the due process of law clause, those acts which do violate the ideas of social justice existing at the present time, they perform a function of inestimable value. That any act passed under the police power which is not contrary to the preponderant ideas of social justice, and which does not violate any specific clause of the federal or state constitution should be upheld by the courts is beginning to be generally recognized. Thus, Mr. Justice Holmes, speaking for the supreme court said: "The police power extends to all the great public needs. It may be put forth to aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderent opinion to be greatly and immediately necessary to the public welfare."

Unfortunately the courts have not always followed the rule here laid down. A judge is not only influenced by precedent if other decisions have been made on similar legislation, but he is also consciously or unconsciously influenced by his own ideas of the necessity for the legislation. These ideas are the result of his education and experience, and this education and experience are not always such as to tend to make him sympathize with modern social and industrial legislation. The education and experience of different judges vary, and therefore, no lawyer pretends to be able to reconcile all the decisions under the police power of the different courts of the United States or even of a sin-

gle court. Of course there are a large number of supposable acts and some that have been actually passed, that are contrary to present ideas of social justice, and therefore are clearly arbitrary and unfair. When a court declares such an act void no protest is heard. The weight of public opinion is back of the decision, for the court has correctly interpreted the then prevailing sentiment, the test of due process in this connection.

The widespread feeling among laymen against courts, and even against written constitutions, which is a new and, I believe, an alarming feature in the current thought of the day, is due to the action of the courts in holding unconstitutional much of the legislation designed to rectify some of the more glaring evils of our present industrial system, such as statutes regulating hours of labor, work in tenements, workmen's compensation acts, etc. From the point of view of those keenly interested in such questions and coming in daily contact with the classes of the community practically affected by them, the effectiveness of such legislation often necessitates provisions which, to persons brought up under the economic and social philosophy of a few decades ago, appear unnecessary and arbitrary. Thus, much legislation which has been passed after years of effort on the part of those having special knowledge of existing conditions, and representing what to them, and indeed to the average man, is plain social justice, has appeared to some judges as unnecessary and arbitrary, and therefore has been held unconstitutional, under the due process of law clause in the constitution. Indeed, any one who has anything to do with promoting social legislation knows, that no matter how carefully an act may be drawn, there is always a doubt in regard to its constitutionality until it is supported by the highest court of the state or by the Supreme Court of the United States. Any important act of any state legislature regulating social or industrial conditions is at the present day often little better than a patent issued by the government in a new art—of doubtful value until it has passed the gauntlet of the courts.

Numerous illustrations may be cited. For example, in 1886 the Supreme Court of Pennsylvania held unconstitu-

tional an act which prohibited the payment of wages of miners in anything but money. The act was aimed at the store-order system of payment, which was regarded by many persons as one of the great evils of the mining regions. The court might have held the act unconstitutional because it did not apply to all laborers. But Mr. Justice Gordon, who gave the opinion, declared that the provisions "are utterly unconstitutional and void inasmuch as an attempt has been made by the legislature to do what in this country cannot be done; that is to prevent persons who are *sui juris* from making their own contracts." In order to make it entirely clear that the ground of his decision was merely that the act was arbitrary, he tells us that the laborer "may sell his labor for what he thinks best, whether in money or goods, just as his employer may sell his iron and coal; and any and every law which proposes to prevent him from doing so is an infringement of his constitutional privileges, and consequently vicious and void." In view of the actual conditions in the coal regions at that time, the court's defense of the liberty of the mine laborer to accept an offer of goods, is a strange mixture of the ridiculous and the pathetic, while the fundamental distinction between the act so unceremoniously declared unconstitutional by the court, and an act prohibiting usurious contracts, is hard to understand.

In spite of the opinion of the Pennsylvania court that in this country such an act cannot be passed, many of our states have passed such acts, following similar acts in Germany and England; and while the opinion of the Supreme Court of Pennsylvania has been followed in Illinois,³ in Kansas,⁴ and in Missouri,⁵ such acts have been held constitutional in West Virginia, in Tennessee, in Colorado, and, in the case of Knoxville Iron Company vs. Harbison, by the Supreme Court of the United States.⁶ The condition, therefore, in Pennsylvania is that, while an act prohibiting the payment of laborers in store orders is constitutional under the federal constitution, and while such legislation has been

³ *Fraser vs. The People*, 141 Ill. 171 (1892).

⁴ *Kansas vs. Haun*, 61 Kan. 146 (1899).

⁵ *State vs. Loomis*, 115 Mo. 307 (1893).

⁶ 183 U. S. 13 (1901).

upheld in other states of the Union, it would require a formal amendment of the state constitution to make possible such legislation in Pennsylvania.⁷

In the well-known "tenement-house case,"⁸ an act of New York which prohibited the manufacture of cigars in tenement houses was declared unconstitutional. In Nebraska it was held to be beyond the powers of the legislature to provide that eight hours should constitute a legal day's work for all classes of mechanics, servants and laborers other than those engaged in farm and domestic labor. The court regarded the statute, not only as class legislation, but also as an interference with the liberty to contract.

Colonel Roosevelt follows Mr. Justice Holmes. He believes that what is due process of law depends on present, not on past ideas of social justice. Therefore, when a court declares that a particular act deprives a person of his liberty or property without due process, it is in accordance with scientific principles to submit to the people the question whether the act is to them arbitrary and unfair. As all the court has done is to declare that the act is not justified by the "strong and preponderent opinion," there is no reason why the correctness of the conclusion should not be referred to popular vote, in order that it may be tested in the laboratory where that opinion is formulated.

But at this point it may be pointed out by those who doubt the practical value of Colonel Roosevelt's proposal, that, under our present system, if the court should be mistaken in regard to the ideas of social justice prevalent at the time in the community, all the people have to do is to have an amendment passed to their constitution specifically stating that an act of the character declared void by the court shall not thereafter be regarded as depriving any one of his liberty or property without due process of law.

It is well, however, to realize the practical result of this process of specific amendment as applied to the due process of law clause. By such amendments the people do not merely sanction a particular compensation act, or particular act

⁷ For the cases and discussion of the acts dealing with store orders see "Freund on the Police Power," sections 319, 320 and 321.

⁸ *In re Jacobs*, 18 N. Y. 98.

regulating the hours of labor; but any compensation act or regulation of hours act which may be passed no matter how arbitrary its provisions.

This is exactly what has happened in New York as a result of the decision of the court of appeals holding the Workmen's Compensation Act unconstitutional. The people of the state seem to differ from the court on the question whether such an act is contrary to the fundamental rules of social justice. The bar association and other bodies more especially interested have, therefore, undertaken to urge the legislature to amend the due process of law clause, by a specific declaration that nothing therein shall be held to prevent a workmen's compensation act. The amendment which has already passed one legislature is as follows:

Nothing contained in this constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment, either by employers or by employers and employees or otherwise, either directly or through a state or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault as a cause thereof, except where the injury is occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty; or for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation; or to provide that the right of such compensation, and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries; or to provide that the amount of such compensation for death shall not exceed a fixed or determinable sum; provided that all moneys paid by an employer to his employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer.

When the amendment is finally adopted practically any compensation act will be constitutional as far as the state constitution is concerned. For instance, an act might be passed providing that a man permanently disabled could only recover an equivalent of half wages for one year, and the courts, bound by the amendment, would be obliged to hold the act constitutional. Thus, under the present system, if the people of the State of New York do not adopt a formal amendment to their constitution, they cannot have any workmen's compensation act. On the other hand, if they do adopt the amendment proposed they can have, not only the particular compensation act which was passed, but any com-

pensation act, no matter how arbitrary some of its provisions or classifications might be.

Or again take some recent history in Colorado. In 1899 the supreme court of that state declared unconstitutional an act which prohibited the employment of persons in underground mines for longer than eight hours per day, except in case of emergency where life or property was in imminent danger. This decision was rendered in spite of the fact that the Supreme Court of the United States had, during the previous year, held that a statute of Utah, identical in terms except as to the penalty prescribed, was valid police regulation. As a result of this decision, the people of Colorado in 1901 approved the following amendment: "The general assembly shall provide by law, and prescribe suitable penalties for the violation thereof, for a period of employment not to exceed eight (8) hours within any twenty-four (24) hours (except in case of emergency where life or property is in imminent danger) for persons employed in underground mines or other underground workings, blast furnaces, smelters; and any other reduction works or other branch of industry or labor that the general assembly may consider dangerous to health, life or limb." Hence, exactly as in the other illustration given of workmen's compensation acts, any act regulating the hours of labor in the employments mentioned which the legislature chooses to pass, no matter how arbitrary the regulation, must be upheld by the courts acting in obedience to the amendment. It would be entirely possible for the general assembly to prescribe six hours, or four hours, or any period less than eight hours as the period of employment.

It takes no prophet to foretell that, with the prevailing desire for legislation which will correct some of the more obvious defects of our social and economic system, if the courts of a state are out of sympathy with such legislation, it will not be long before, by successive amendments, the due process of law clause of the constitution of the state will be practically abrogated. If no other system be provided, the present method of constitutional amendment, while permitting the people ultimately to express their desires in the constitutions, will, in the necessarily short state-

ment of specific amendments, endanger other constitutional guarantees of their liberties which all consider essential to retain.

The advantages of Colonel Roosevelt's suggestion as applied to such instances as those referred to are obvious. He provides, it will be observed, a method of obtaining legislation which does correspond to the prevailing ideas of fairness and social justice, while at the same time retaining in our constitutions the principle that no act which is arbitrary or unfair should be recognized as law.

There is, however, one illustration which has been produced to show that the plan proposed by Colonel Roosevelt, instead of being a moderate and sane proposition as here claimed, is radical and dangerous. There is a class of cases in the courts, which, instead of declaring an act unconstitutional, merely states that it is unconstitutional as applied to the particular party to the litigation before the court, but not necessarily unconstitutional as to all persons who might be brought under its provisions. The case of *Pennsylvania Railroad vs. Philadelphia* is a case in point. In that case the court declared that the act of April 5, 1907, which provided that no railroad in the state should charge more than two cents a mile for the transportation of passengers, was unconstitutional as applied to the Pennsylvania Railroad, because that railroad could not make a reasonable return on its investment under such a regulation. At the same time the court admitted that, as far as the act applied to another railroad operating under different conditions, it might be constitutional. Similar decisions might be and have been made where the legislation has fixed the price on gas or other commodities furnished by a public service corporation.

It is pointed out that had the plan proposed by Colonel Roosevelt been in operation, the question whether the act should or should not apply to the Pennsylvania Railroad could be put to popular vote, and a vote in the affirmative would in effect, as far as the future charges were concerned, reverse the judgment.

It is, of course, beyond question that the plan proposed by Colonel Roosevelt would cover such a decision as the

one referred to. The act declared that no railroad operating in the state should charge more than two cents a mile. There is no question but that the act applied to charges by the Pennsylvania Railroad. The court, therefore, declared the act unconstitutional as applied to conditions to which it was clearly intended to apply.

Personally, I believe that an act of the legislature which does not confer the power to make railroad rates on a commission, but, as the Pennsylvania act did, lays down by direct legislative action a definite rate, is essentially unsound and vicious. I have, therefore, sympathy with the very natural inquiry: "Would you put the question to the people as to whether such an act, in spite of the opinion of the court that it left some at least of the railroads of the state without an adequate return on their investment, go before the people to be voted on?" My reply to this question is that I certainly should not sign a petition to have such an act placed before the people, any more than I would move for its consideration, or vote in its favor if I were a member of the state legislature.

But the plan proposed by Colonel Roosevelt is not, in relation to the illustration now under examination, essentially different from the method of amendment now in force. It is perfectly possible to-day to amend our state constitution by popular vote, and then adopt a two cents a mile railroad rate bill, if there are enough persons determined to have such an act. Colonel Roosevelt's proposition, therefore, involves but a change in method. And, furthermore, there is just as much likelihood of the people of the State of Pennsylvania losing their heads and insisting on the adoption of such an amendment, as there is, under Colonel Roosevelt's plan, of their re-adopting such an act as the one referred to, after the decision of the court holding that, as applied to at least one railroad, it is unconstitutional.

There is a large number of persons who believe that the system by which a court is permitted, under the due process of law clause, to declare void an act of the legislature, merely because they believe that an act is arbitrary and unfair, is unwise. Such persons assert that this power in the courts makes of this country a "judocracy," and that the

rule of judges is in the long run as intolerable, as the rule of an aristocracy or of any other special class. But, personally, I believe, that many acts are passed by legislatures without much consideration, and often at the instance of particular classes of the community, which do violate prevalent ideas of social justice, and that it is a peculiar advantage to our system of government in the United States, that we have a judiciary charged, by custom at least, if not by direct mandate, with the duty of refusing to regard an act as valid if in their opinion it is arbitrary and unfair. It is submitted that the people are entitled to be told by the court, that the act which the legislature has passed, is, in the opinion of at least the majority of the members of the highest court of the state, an arbitrary act. If after full notice and consideration they then choose to differ from the court, and adopt the act or a constitutional amendment, it can at least be said that the act was adopted on due consideration. I have, however, on the other hand, no sympathy with those persons who declare, that merely because an act has appeared as arbitrary and unfair to a small body of men—perhaps merely to three out of five, or four out of seven, persons—that thereafter that act or any act like it cannot become a law, irrespective of the desire and opinion of the people. As between these two extremes—the desire of those on the one hand who would take from the judges all power to declare an act unconstitutional under “the due process clause” and on the other hand the desire on the part of a few to place all progress in social legislation at the mercy of the courts, the proposal of Colonel Roosevelt appeals as a sane proposition, tending to preserve the court in its power to set aside acts which appear to the judges as arbitrary, and yet at the same time preserving to the people the power ultimately to express in legislative form any law which a persistent majority desires.

This perhaps is the proper place to refer to a question which is frequently asked: Under Colonel Roosevelt's plan, how far would the action of the people in enacting legislation which the court has previously declared to be contrary to the state constitution, be regarded as a precedent which should influence the court when the act approved by

the people is repealed, a second similar act is passed, and the question of the second act's constitutionality is brought before the court? If the original act was declared unconstitutional because it violated some specific clause of the state constitution, as the clause to which I have referred from the Constitution of Pennsylvania, or a clause protecting the obligation of contracts, the action of the people would, and should, have no effect on the court when another similar act was before it. But as "due process of law" is that which corresponds to the preponderent and prevalent ideas of social justice in the community, a vote of the people adopting such an act as, for instance, a workman's compensation act, would, and should have great weight with the court when the second act on the same subject came before it, but so far only as it shows that such legislation, in its principle, is not arbitrary and unreasonable.

There is one matter which has tended to somewhat obscure the fundamental idea which is back of Colonel Roosevelt's suggestion. At the present time the method of amending our state constitution differs greatly among the several states. In many states, the method of amendment is exceedingly cumbersome. In my own state, Pennsylvania, for instance, in order to amend the state constitution, the amendment must be passed by two successive legislatures before it can be voted on by the people, and the legislature meets only on alternate years. As a result of this and similar conditions in other states, there is a very widespread feeling among large classes of people that the methods of amending state constitutions, and even our national constitution, should be less cumbersome than they are. This is not the place to enter on a discussion of the merits or demerits of this suggestion. The plan proposed by Colonel Roosevelt is, as I have tried to show, a method of dealing with the differences of opinion between the court and the people on what regulations are arbitrary and unfair when applied to existing social and economic conditions. The length of time which should elapse between the decision of the court declaring the act void and the vote of the people on the act is a matter of detail. By this I do not mean it is unimportant. It is very important that the peo-

ple shall have an opportunity to consider carefully the act and the opinion of the court before being asked to vote upon it; but at the same time, it is a detail in that it does not affect the essential features of Colonel Roosevelt's plan, whether the interval of time is three months, six months, a year or even more.

One other matter should be referred to. Colonel Roosevelt has emphasized the fact that his suggestion for all present practical purposes applies only to acts which have been declared unconstitutional because they violate state constitutions, and not to acts declared unconstitutional because they violate the national constitution. I have emphasized the fact that the value of the suggestion made by him is largely confined to cases in which acts have been declared unconstitutional because they violated that clause of the state constitution which prevents property from being taken without due process of law. But the fourteenth amendment of the federal constitution also contains a provision "that no state shall deprive any person of his life, liberty, or property without due process of law." Suppose an act comes before the state court and is declared unconstitutional because depriving a person of his property and without due process of law contrary to that provision in the state constitution. Subsequently, under Colonel Roosevelt's plan, the act is voted on by the people, and becomes, as far as their votes can make it, a law of the state. The act again comes before the same court. The action of the people prevents that court from saying that the act is not a law because against the state constitution; but what prevents them from declaring the act unconstitutional because it violates the fourteenth amendment of the federal constitution? There is, of course, nothing to prevent their doing so. There is nothing, for instance, to prevent the Supreme Court of New York, after the state constitution is amended so as to permit the passage of workmen's compensation act, and another workmen's compensation act is passed, from declaring the new act void under the federal constitution. But the action of the people has at least enabled the question of the constitutionality of the act under the federal constitution to be brought before the Supreme Court of the United

States. It is true that the methods of doing this under the present provisions of the federal Judiciary Act are exceedingly cumbersome. Under the twenty-fifth section of that act, it is at present impossible to take a case to the Supreme Court of the United States from the highest court of the state where the latter has declared the act unconstitutional under the federal constitution. To bring the question before the supreme court, therefore, a case, and perhaps the first case, must be brought in the federal courts under the provisions of the third article of the Constitution of the United States which gives to those courts jurisdiction in cases of diverse citizenship. There is, however, a movement, now embodied in an act pending in congress, and which has the support of the American Bar Association, to amend the judiciary act which, should it be successful, will enable an appeal to be taken to the Supreme Court of the United States from a state court by either party, when the state court holds an act unconstitutional under the federal constitution. In any event, however, as stated, the Supreme Court of the United States would have an opportunity to pass on the question.

It may be asked, what would be done when the Supreme Court of the United States declared an act unconstitutional under the "due process" clause of the fourteenth amendment? If Colonel Roosevelt's plan is sound, why should it not apply and the act be referred to all the people of the United States? There is, of course, in theory no reason why this should be done. I think, however, you will agree with me that it will be better to meet that question when, in passing upon acts demanded by the sense of social justice prevalent in the persistent majority of the people, the action of the Supreme Court of the United States in repeatedly declaring them unconstitutional, has created a strong sentiment among the people that that court does not represent modern ideas of social justice.

While this is the feeling towards many state courts, it is not to-day the feeling towards the Supreme Court of the United States. There is, I am glad to say, a very general belief that that court, as now constituted, is probably in reasonably close touch with the desire of the people for social

and economic legislation looking to the betterment of the conditions of life. The prevailing confidence that the Supreme Court of the United States will uphold, in spite of the decision of the Court of Appeals of New York, the constitutionality of any reasonable workmen's compensation act, either elective or compulsory, is an example of what I mean. Therefore, I think Colonel Roosevelt indicates the possession of a very large measure of practical wisdom when he suggests, that the plan he proposes, for the present at least, be confined to acts declared unconstitutional by state courts under state due process of law provisions.

Law Notes. 16:4-6. April, 1912.

Recall of Decisions. Berkeley Davids.

It is not at all clear that any disorder to our system of jurisprudence would flow necessarily from the adoption of this proposal. Constitutions are the enactment of the people. Their provisions are determined upon by the people's representatives or agents, and these provisions are submitted to the people for their approval. The amendments to the Constitution that are made from time to time are enacted in this manner. It rests with the people to decide what provisions the Constitution shall contain, and the true meaning and import of any particular provision must be what the body of people who adopted it conceived its meaning and import to be. And in determining the import of a constitutional provision, is it not the duty of the courts to endeavor to discover this popular concept or common understanding? If this is true, how much more certain are we of getting at that understanding by submitting the question to the people directly? The case is simply one of the people resuming the function with which they have clothed the court, and determining the question at first hand.

Again, it must be admitted that the common understanding of constitutional provisions must be interpreted with a view to changes in conditions. The federal Constitution concededly has been held by the Supreme Court

to have a meaning quite different from that placed upon it by its framers. And this is as it should be. Otherwise progress would be stopped. Now, then, if it be admitted that the Constitution is plastic, suiting itself to changes in the social and economic life of our people and the growth of our civilization, who is it that shall say, after the lapse of a century, what is the import of a particular constitutional provision? The capacity to judge presupposes a knowledge of our economic life both high and low—that of the butcher and baker as well as the banker and broker. Are any three or five or seven judges endowed with this knowledge—men who have spent their lives with the technicalities of the law? If they are, then we had better clothe them with the entire legislative function, and do away with the legislature, to say nothing of the initiative and referendum. Conceive the judges of our courts to be such omniscient beings that they are in touch with the current of thought and development. They mould their decisions to fit the needs of changing conditions so nicely that legislation becomes unnecessary. Such judges never would have recognized the abomination known as the fellow-servant doctrine (indeed the Missouri court did not for a time, if we remember correctly). Nor would there be such a thing as overruling a previous decision.

This is not the case, however. Our judges are not omniscient. They do not express public sentiment and opinion at times as it is their duty to do. "It is proper that both legislative and judicial decision should keep abreast of the times," said Mr. Justice Paxson in *Dimmick v. Cook*, 115 Pa. St. 580, 8 Atl. 627. In fact the courts are always one jump behind the popular concept of the law. Law is custom principally, and custom is made by the people, not by the judges. The people create the custom, and the judges apply it under the name of law. We know that there has been a rising tide of sentiment in favor of the workaday world as against the capitalist and employer. The decisions of the courts in a majority of states in construing the common law disclose this tendency. Servants actions are given greater consideration, recoveries being allowed in cases that formerly would have been dismissed. In the

construction of statutes the same tendency is noticeable. This, it is asserted, is the general tendency. The courts of some states are much more liberal—that is, in touch with the development of the idea—than are others. Some courts are conservative, reactionary. And so it is not surprising to find the court of New York holding a Workmen's Compensation Act invalid, and, at the same time, the court of Washington sustaining the same act against the same objections.

The too great conservatism of some courts is evidenced by a multitude of instances wherein they have so construed statutes as to make them operate upon nothing, thereby necessitating further legislation, which in turn has been restricted unduly in its operation by the court. And so a small number of judges have been able to defeat and set at naught the purpose of the people of the commonwealth for years at a stretch.

The recall of decisions has been compared to amendments to the Constitution, it being urged that the present machinery for altering the fundamental law is adequate, and hence that the recall is superfluous. But the interpretation of an existing constitutional provision differs in some aspects from amending that instrument. The constitutional guaranties of "due process" and "equal protection" can be and have been varied by judicial interpretation. But no amendment of these provisions has ever been attempted. Many publicists are clamoring for a partial or even total abrogation of our state constitutions, asserting that if they ever were useful and necessary that time has passed. And it seems to be inevitable under the existing conditions that some changes must be made. When a court holds the Workmen's Compensation Act to be invalid on the ground that it takes the employer's property without due process of law, the only way to circumvent this impediment to progress is to amend the due process clause. Rather than resort to this expedient, would it not be better to adhere to the interpretation method of amendment and recall the court's decision? Viewed in this aspect the recall of decisions may be a means of preserving the constitution rather than an engine to destroy it. The action

of the voters upon the question propounded to them may be deemed to be the same in either case. Their answer will be the same whether the question is termed an amendment of the Constitution by adding certain words thereto, or whether it is denominated an interpretation of the Constitution so as to give it a certain meaning. Furthermore by recalling a decision we do not increase the amount of written law, whereas by the adoption of a constitutional amendment we give the courts an opportunity to quibble over the meaning of every word thereof and to fill pages of the reports with nice calculations in accordance with ancient rules as to what the people meant in adopting it.

President Taft also says in the speech above referred to: "The interpretation of the Constitution and the operation of a law to violate some limitation of that instrument are often nice questions to be settled by judicial reasoning and farsighted experience, which are not to be expected of the electorate, or welcomed by it." And again: "A most serious objection to the recall of decisions is that it destroys all probability of consistency in constitutional interpretation." A number of answers may be made to these objections. One is that if "judicial reasoning" were dispensed with in some measure we should not be greatly worse off than we are. "Rules of reason" have served to muddle as much as to clarify many constitutional questions. What we need is more practical sense. Furthermore a host of excellent judicial decisions have been rendered without resort to reasoning. As for the "farsighted experience," it may be answered that the legislatures have been kept very busy in changing many of the rules established by the courts' farsightedness—on the law of master and servant for example.

Nor does it seem possible that the "popular decisions" can be more inconsistent than those of the courts—some courts, at least. On every sort of constitutional question we find the courts disagreeing with each other. Earlier decisions are overruled, and afterwards reestablished. Some lines of decisions of the United States Supreme Court show a repeated wabbling to and fro upon questions; nor does the court itself try to harmonize these cases. If, then,

judicial minds are uncertain and arrive at conflicting conclusions, it would seem that the ruling of the people is as apt to be right as, or more apt to be right than, is the decision of the court, because the people are "abreast of the times," whereas the courts frequently are not.

It is a fact that the courts are continually engaged in overruling (or recalling) their own decisions. What, then, is so preposterous in the people accomplishing the same end? Why should it occur more often in the latter case? Some of the Colonel's critics would lead you to suppose that he proposes a referendum to the people of every constitutional question raised in any judicial proceeding. Of course the Colonel did not contemplate this. His idea, if we grasp it correctly, is that when a decision of the court of last resort overthrows legislation which plainly expresses the people's conception of what the law should be, they shall have a right by a simple referendum to reverse the decision and substitute their interpretation of the constitution for that of the court. Such a referendum might not occur as often as do referenda of proposed constitutional amendments. Possibly it would never be necessary to resort to it. The courts might become closer students of economic conditions and render only decisions meeting popular approval.

Annals of the American Academy. 43: 278-85. September, 1912.

Dangers That Lurk in the Recall of the Judiciary.

James A. Metcalf.

The Judicial Referendum

In view of very recent political discussions, there should be added hereto a brief consideration of a proposed judicial reform which is sometimes referred to as "the recall of decisions," but which is more properly entitled "The Judicial Referendum."

There is no identity of operation or effect between the recall of judges and this proposed judicial referendum,

and the two should not be confused in consideration. The one is demanded as an available weapon to be wielded by popular frenzy; the other is desired to be used as a well-considered, thoughtful means for insuring genuine popular government in finality.

The judicial referendum does not propose to disturb the judges in the exercise of their ordinary functions, nor in the determination of the multitudinous causes which make up the routine of the courts. It will not prejudice the decisions of the judges through fear or threat of the imposition of a personal penalty; in fact, its operation would have no direct relation to be personnel of the courts. In this respect it is entirely different from the recall, and it must not be judged from the same viewpoint. The dangers that pertain to the latter are entirely absent from the former.

Question of "Constitutionality" Only

The judicial referendum would have to do with the final determination of the constitutionality of the laws only. I can well understand that even this suggestion is a shock to the long-cherished doctrine of the infallibility and inviolate integrity of supreme court decisions. But let us note that the judicial referendum would simply proceed upon the undoubtedly correct theory that, in a genuinely popular government the will of the people of rights should be in our own government, eventually must be, supreme in all things. It must be admitted in theory, even though the proposed practice be dubiously considered, that the people are entitled to clearly express their will and by some means make the same effective in every branch of the government. Therefore, if the courts shall determine, through resort to technicality or pure precedent, that a certain law is unconstitutional and shall hereupon suspend its operation, even though such law would seem to have been duly enacted by the people or their accredited representatives, it is contended that there shall still reside in the people, as of inherent right, the power to determine, by means of a judicial referendum invoked by petition in an orderly manner, whether such law shall finally stand in legal sufficiency and sanction.

Not a "Recall of Decisions"

It is not proper to name such a process "the recall of decisions," which phrase does not clearly establish its proper relation to the general scheme of government. It is of higher status than such a description would indicate. It is in reality the re-enactment of a law that has come into conflict with judicial conservatism. It constitutes a test of the certainty of the popular will through a required re-expression thereof and is in effect a broad application of the principle underlying the initiative and referendum. It has been described by some as a quick and easy means for effecting a constitutional amendment, but that again places it on a too low plane, for it occurs to me that legislation which had survived the adverse action of the supreme court and had been thereupon re-enacted into law by the direct vote of the people would possess even a greater sacredness and sanction than the constitution itself, whose title to veneration has hitherto rested largely upon its undisturbed existence as the generic, formative law of the land.

No Disturbance of the Courts

While the recall of judges would proceed with demoralization of the courts and would weaken the entire body of the law because of the resultant impotency of its interpreters and their constant fear of popular revenge, the operation of the judicial referendum would in no sense disturb or interrupt the ordinary course of jurisprudence, nor would it surround the judges with any greater uncertainty than now confronts them in the possibility of review and reversal by the court of final resort.

I do not apprehend that the judicial referendum system would abolish the supreme courts or lessen their usefulness. By its introduction we would simply erase from our present judicial system, the doctrine of the inviolability of decisions on constitutional questions, and would substitute the people as the court of final appeal, as the residual right of democracy. Full consideration would still be given supreme court decisions. In a majority of cases such decisions would un-

doubtedly stand without question, for they would be more carefully and conscientiously considered than is now sometimes the case. If any faction proposed to overturn a supreme court decision, the ultimatum of the court and its accompanying reasons would exert a strong moral effect for the preservation of peace and good order. The invocation of the judicial referendum would take time, and through it all, with platform, press and pulpit at work, no ill-considered or dangerous action would result.

NEGATIVE DISCUSSION

**New York State Bar Association. Proceedings. 35: 148-67.
1912.**

Judicial Decisions and Public Feeling. Elihu Root.

The general respect for the decisions of our courts, which has sustained the judicial branch of our government as a distinctive and necessary part of our constitution system, has been based upon the idea that judicial decisions are something quite distinct and different from the expression of political opinions or the advocacy of economic or social theories. Profoundly devoted to the reign of law, with its prescribed universal rules, as distinguished from the reign of men with their changing opinions, desires, and impulses, our people have always ascribed a certain sanctity to the judicial office, have invested its holders with a special dignity, and have regarded them in the exercise of their office with a respect amounting almost to reverence, as above all conflicts of party and of faction, because these officers are the guardians of the law as it is. Our people have been imbued with a deep sense of the truth that upon the preservation of the law as it is at every moment in its course of continuous change and development, depend the preservation of order, the prevention of anarchy, the protection of the weak against the aggression of the strong, the perpetuity of free institutions, the continuance of liberty and justice; matters of infinitely greater concern than all the new proposals which excite the activity and controversy of parties and political leaders, of critics and reformers.

If this view is to be changed and the decisions of our courts are to be considered in the same way and upon the same presumptions, and with no greater respect for author-

ity than in the case of political opinions, the authority of the courts will inevitably decline, the independence of the judicial branch will cease, judicial decision will interpret the law always to suit the majority of the moment, and the recall will be the natural and logical expression of the relation to be assumed between the people and the courts.

What are the causes of this impatience with courts? It is plain that the difficulty does not arise from any deterioration in the character of the judges who preside in our courts. There never has been a time when the bench in America, both under the federal and state systems, has been filled by men of greater purity, ability, and strength and uprightness of character. There never has been a time when the favor of the rich or of men powerful in social or business affairs played so small a part in determining the selection of judges. Now, if ever, the terms of the federal judicial oath truly represent the controlling influence of judicial life in both the nation and the states.

"I ———, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ——— according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States: So help me God."

It is true that defects in procedure, that technicalities and delays which impede the course of justice here and elsewhere have tended to decrease the general respect of the community for every one concerned in the administration of the law, but I think this applies less to the courts themselves than it does to the bar, and justly so. It is the bar that makes up a great part of all our legislatures and is responsible for the stupid and mischievous legislation regarding procedure which hampers the courts in their efforts to do justice. It is the bar which, knowing all the facts and familiar with all the evils, insists upon the continuance of our methods to promote the immunity of criminals and the hindrance of justice to the point of denial. The primary fault and the primary duty of reform rest with

us. I do not think that this matter plays any very great part in the creation of the feeling against the courts.

The real difficulty appears to be that the new conditions incident to the extraordinary industrial development of the last half century are continuously and progressively demanding the readjustment of the relations between great bodies of men and the establishment of new legal rights and obligations not contemplated when existing laws were passed or existing limitations upon the powers of government were prescribed in our Constitution. In place of the old individual independence of life, in which every intelligent and healthy citizen was competent to take care of himself and his family, we have come to a high degree of interdependence, in which the greater part of our people have to rely for all the necessities of life upon the systematized co-operation of a vast number of other men working through complicated industrial and commercial machinery. Instead of the completeness of individual effort working out its own results in obtaining food and clothing and shelter, we have specialization and division of labor which leaves each individual unable to apply his industry and intelligence except in co-operation with a great number of others whose activity conjoined to his is necessary to produce any useful result. Instead of the give and take of free individual contract, the tremendous power of organization has combined great aggregations of capital in enormous industrial establishments working through vast agencies of commerce and employing great masses of men in movements of production and transportation and trade so great in the mass that each individual concerned in them is quite helpless by himself. The relations between the employer and the employed, between the owners of aggregated capital and the units of organized labor, between the small producer, the small trader, the consumer, and the great transporting and manufacturing and distributing agencies, all present new questions for the solution of which the old reliance upon the free action of individual wills appears quite inadequate. And in many directions the intervention of that organized control which we call government seems necessary to produce the same result of justice and right conduct which

obtained through the attrition of individuals before the new conditions arose.

Such a readjustment must of necessity be a gradual process. It cannot be produced at a single blow from the mind of any one group or interest or class. Opinions must and will always differ as to the nature of changes which should be made and the extent to which they should go, and those differences must be settled in some way. There will be differences not merely as to what change should be brought about, but how it should be accomplished. Mistakes will be made, experiments will be tried and will fail, and experience will suggest more adequate remedies. Ill-conceived schemes of legislation or amendment will be attempted and steps will have to be retraced. Erroneous views, arising because some parts of our people fail to understand phases of our vast and complicated industrial life with which they are not familiar, must be corrected. Distorted and exaggerated conceptions disseminated by men of one idea or by men overinsistent on their own personal interests, or overexcited by contemplating unhappiness and privation which perhaps no law or administration could prevent, have to be reduced to proper proportions. Ultimately, step by step through the ordinary processes of self-government, through investigation, education, the spread of true understanding of facts and full discussion, the process of readjustment is being worked out and will be worked out to conform to the mature, instructed, considerate judgment of the self-governing people of the country.

It is because in the course of this process of readjustment occasionally a court finds that some new experiment in legislation or in administration contravenes some long established limitation upon legislative or executive power, or finds that some crudely drawn statute is inadequate to produce the effect that was expected of it, or enforces some law which has unexpected results, that the present irritation and impatience towards the courts has been created.

There are several things to be said about this feeling. In the first place it rests upon a misconception as to the true function of a court. It is not the duty of our courts to be leaders in reform or to espouse or to enforce eco-

conomic or social theories, or, except within very narrow limits, to readjust laws to new social conditions. Undoubtedly every judge is bound to consider two separate elements in his decision of a case: one, the terms of the law, and the other, the conditions of actual life to which the law is to be applied; and it is only by considering both that the law can be applied in accordance with its real spirit and intent. But the judge is still always confined within the narrow limits of reasonable interpretation. It is not his function or within his power to enlarge or improve or change the law. His duty is to maintain it, to enforce it, whether it be good or bad, wise or foolish, accordant with sound or unsound economic policy. It is very important to have reformers and advocates of all good causes, and thoughtful and public-spirited citizens who are keenly alive to the defects in our system of laws and solicitous to find means to cure them. But the courts are excluded, by virtue of the special duty imposed upon them, from playing any of these parts. Their duty is to maintain and enforce the law as it is at the moment, to interpret it in sincerity and truth under the sanction of their oaths and in the spirit of justice, to accept loyally every change made in it by the law-making power, but to stand firmly against any attempt to ignore it or nullify it, except by the legitimate action of the popular sovereign in its making of constitutions, or the legislative branch of the government in its making of statutes in conformity to the Constitution.

This impatience of the courts also proceeds upon a second misconception as to the true nature of the remedy for an unsatisfactory decision. When a court of last resort has said the law is thus and so, and the law as so declared bars the way of some popular movement, the true remedy is, not to threaten the court with extinction or its members with punishment unless they will decide against their convictions; but it is to set the law-making body in operation to change the law, and if a majority of the people wish the law changed it will be done. If the community is not satisfied with a law as it is declared by the court to be, the thing really desirable is, not to coerce or reconstruct a court to say that the law is what it is not, but to make

the law what the community wishes it to be. The only real obstacle to any such course rests in the fact that it frequently happens that the people of a state or of the country are not yet ready for the change which is desired by the impatient ones. These may be merely in advance of the rest of the people. It may be, and doubtless it frequently is the case, that their views are the views which ought to be adopted and which will ultimately be adopted by the people in their law making, but the process of securing the adoption of new and advanced ideas may be long and tedious. It may involve a campaign of education, a reconciliation of conflicting views, and much discussion as to the kind and form of change. I cannot think that to incur the necessity of this process is an evil. Important changes in the law ought to be fully discussed and understood, and approved by the mature judgment of the people of the country. We have too many immature and premature attempts at making laws before the subjects to which they relate have been thoroughly discussed and mature conclusions have been reached.

In considering the inconveniences which have arisen from decisions of the courts enforcing constitutional provisions as against popular statutes, it is a mistake to consider the particular incident by itself and to lose sight of the enormous and overwhelming importance of the system to which these inconveniences are incidents, and to forget that by destroying the independence and authority of the courts and the popular habit of submission to their decisions we would lose infinitely more than we would gain. Let me try to state the essential thing that we would lose.

One of the fundamental ideas of our government is that all the officers to whom the people, whether of the nation or of the state, intrust the powers of government shall be subject to certain definite prescribed limitations upon their power. These limitations are of two kinds. First, those which relate to the distribution of powers. The national government and the respective state governments are each to keep within its own prescribed field of action. The legislative, executive, and judicial officers are to be confined to their own departments of government. Within those

departments particular officers, wherever it is found expedient, have specific lines of limitation upon their power. If an officer undertakes to do something which is not within the prescribed limits of his authority, his action is void and without legal effect. No matter how able and patriotic a president or a governor may be, no matter how wise a Congress or a legislature may be, no matter how much they may deem it to be for the public good that they should invade the field of action of another department, they are denied the right to do it, not because it might not be a very good thing in the particular case, but because the prevention of unlimited power is of such vast importance to liberty that no particular case can possibly be important enough to justify abandoning the maintenance and the observance of the general rule of prescribed limitations.

The other kind of prescribed limitation is for the protection of the individual citizen against the power of government.* Our fathers had experienced some and observed many invasions of individual liberty and individual right of which governments had been guilty. They realized that the nature of men is not greatly changed by a change in the form of government, and that the possession of overwhelming power affords a constant temptation to override the rights of the weak. Accordingly, both in the nation and in the state, they prescribed certain general rules which prohibited all officers to whom they intrusted the powers of government from doing certain things, such as inflicting cruel and unusual punishments, abridging freedom of speech or of the press, prohibiting the free exercise of religion, putting any person twice in jeopardy for the same offense, compelling any one to be a witness against himself in a criminal case, taking private property for public use without just compensation, depriving any one of life, liberty, or property without due process of law. It frequently happens that inconvenience results from the application of these rules. Criminals escape because they cannot be tried twice or cannot be compelled to testify; public improvements are hindered because property cannot be taken except by due process of law; the liberty of the press and of speech often degenerates into license, and many poor people are misled to their harm

by the doctrine of strange and irrational religious sects. Nevertheless the maintenance of these rules is the bulwark which protects the weak individual citizen in the possession of those rights which constitute liberty; and it is because these rules with all their inconveniences, if maintained at all, must be always maintained, that the public officer who oversteps them, with however good intentions and for whatever benefit to the public, becomes a trespasser without authority and without protection of the law.

A second and equally necessary feature of our system is that these limitations, both those which distribute official powers and those which declare the great rules of right conduct, must be prescribed abstractedly and impersonally, rather than with reference to particular cases or particular exigencies or particular individuals. The difference is generic, essential, world wide. The very fact of making a Constitution which is to be binding upon legislatures and executives and judges when they come to deal with particular cases exhibits the rules prescribed in the Constitution in sharp distinction from the determination of official power when particular cases arise. It is not possible for any human power to make the determination of a legislature or executive at the time of action the same thing as an obligatory general rule of conduct prescribed beforehand. The difference between a constitutional convention prescribing constitutional limitations and a legislature dealing with particular exigencies is not that one represents the people any more truly than the other, or is of any higher character than the other, but it is that one deals with justice, with right conduct, with the requirements of liberty, with a due balance and distribution of the powers of government, impersonally and in the abstract without reference to individuals or the interests or prejudices or inconveniences of particular cases; while the other deals with the particular cases to which the general impersonal rule applies. So we deal with abstract rules by themselves, and we deal separately with the particular cases in which governmental action is to be governed by those rules. We know that human nature is such that the two cannot be combined; that a decision upon a rule of abstract justice cannot be com-

bined with a decision as to the accomplishment of a particular wish, any more than a man can render justice when he sits as a judge in his own cause.

A third feature of our system which is a necessary corollary to the other two, and essential to them, is the vesting of power in the judicial branch to determine when the action of the legislative and executive branches or any officer of them eversteps the limitations which have been prescribed. Without this all our bills of right and limitations upon official power would be idle forms of words. If the law-making body of the moment, whether it be a representative legislature or a majority at the polls, is to determine at the time of action either what shall be the rules to control its conduct or the question whether its conduct conforms to the rules already prescribed, the conduct is controlled only by the will of the law-making body at the moment of action, and our whole system of prescribed limitations upon power disappears. The necessary result is that the barriers we have set up from the beginning of our government against official usurpation of power and against official invasion of the liberty and rights of the individual, are broken down, and the power of the majority according to the will of the moment is supreme and uncontrolled.

If the people of our country yield to the impatience which would destroy the system that alone makes effective these great impersonal rules and preserves our constitutional government, rather than endure the temporary inconvenience of pursuing regulated methods of changing the law, we shall not be reforming, we shall not be making progress, but we shall be exhibiting the weakness which thoughtful friends of free government the world over have always feared the most—the lack of that self-control which enables great bodies of men to abide the slow processes of orderly government rather than to break down the barriers of order when they obstruct the impulse of the moment.

What is the remedy for this condition? How can the process be arrested?

I think the courts can do something. They may sometimes perhaps keep more fully in mind what Chief Justice

Marshall said in the case of *Fletcher v. Peck*: "The question, whether a law be void for its repugnancy to the Constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture, that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

Sometimes perhaps they may take a little more pains, when they have to decide against the constitutionality of a law, to make the grounds of their decision intelligible not merely to technical lawyers, but to laymen. Although the decision in a case technically affects only the parties, when the case becomes the occasion for a decision affecting great numbers of people it is as much a judicial duty to see that the people do not misunderstand the ground and scope of the decision as it is to see that the parties and their counsel are informed.

It may be also that some judges who have been long withdrawn by their duties from active participation in current affairs could profitably study with more interest those changes of social conditions which make necessary new applications of the police power of the state—that vast and adaptable power preserved in all constitutions, the basis of which rests in common sense and the relation of which to the specific guaranties of the Constitution must always be subject to adjustment according to the varying needs of the time. The Supreme Court says of this power in the case of *Barbier v. Connolly*: "The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and

security be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of state, develop its resources, and add to its wealth and prosperity.”

The bar can do much. A lawyer has special opportunity to acquire a just sense of the importance of preserving the constitutional system of our country and of maintaining the undiminished power of a really independent judiciary. He can explain this and insist upon it among his clients and his fellow citizens in private and in public, and can secure for it from citizens in general that attention and thoughtful consideration which alone is necessary to secure just results among an intelligent people.

One other thing we can all do, and that is to encourage and exhibit the true spirit of temperate and patriotic consideration, which is the primary requisite to success in working out the problems of self-government.

Forum. 48: 45-60. July, 1912.

Constitutional Chaos. Charles H. Hamill.

Recall of decisions means amending state constitutions so as to provide that they may thereafter be amended by

a majority popular vote, adopting, not general provisions affecting all alike, but regulations which may be special and temporary. Not only would it be for many reasons a dangerous governmental device, but it would have exactly the opposite effect to that claimed by its advocates, giving less rather than more immediate control to the people over their political destinies and making our institutions after a little time less instead of more adaptable to changing needs.

Returning from the pursuit of beasts more ferocious but less dangerous than judges, Colonel Roosevelt began in 1910 a series of criticisms of the courts. It was not, however, till the Columbus speech, delivered just before the announcement of his candidacy, that he offered a remedy for the ills he deplored. Later, in the Carnegie Hall speech, he gave a more exact definition of his proposal. There, after disclaiming any intention with reference to the Supreme Court of the United States, or to ordinary civil or criminal proceedings or the recall of judges, he stated his position thus: "I am proposing merely that in a certain class of cases involving the police power, when a state court has set aside as unconstitutional a law passed by the legislature for the general welfare, the question of the validity of the law—which should depend, as Justice Holmes so well phrases it, upon the prevailing morality or preponderant opinion—be submitted for final determination to a vote of the people, taken after due time for consideration."

It does not appear that in any of his articles or speeches the Military Statesman has pointed out whether in his opinion the reform contemplated can be effectuated without constitutional amendment, but the implication of the Carnegie Hall speech is that it can be, for he there quotes from the remarks of Dean Lewis of the Law School of the University of Pennsylvania, thus:

"Constitutional amendments, designed to meet particular cases, run the danger of being so worded as to produce far-reaching results not anticipated or desired by the people. Colonel Roosevelt's suggestion avoids this difficulty and danger. If a persistent majority of the people of New York state want a workmen's compensation act, they should have it, but in order to obtain it, they should not be driven to pass an amendment to their state constitution which may have effects which they do not anticipate or desire. Let them pass on the act, as passed by the legislature, after a full knowledge that their highest court has unanimously

expressed its opinion that the act is contrary to the constitution which the people at a prior election have declared to be their fundamental law."

This contemplates the reform without constitutional amendment. How is it to be done? Suppose the legislature should pass an act providing that hereafter when the Supreme Court shall have declared unconstitutional any act of the General Assembly purporting to be an exercise of the police power, the act shall be submitted at the next general election and, if ratified by the people, shall be the law, notwithstanding the opinion of the Supreme Court. If a case arose under an act so ratified, would the Supreme Court consider itself so bound? Would it not be obliged to say: "Under the constitution 'The judicial powers, except as in this article otherwise provided, shall be vested in one Supreme Court.' The constitution does not provide that the decisions of the Supreme Court shall be subject to review. This court has held that act unconstitutional. The vote of the people alone does not change the constitution. The constitution itself provides how it may be amended"?

If, therefore, a constitutional amendment be required, there is still the difficulty of deciding what form such an amendment should take. Suppose by the means now provided each State constitution should be amended so that an article reading substantially as follows should be added:

"Whenever an act of the General Assembly purporting to be an exercise of the police power shall have been held by the Supreme Court obnoxious to any provision of the Bill of Rights of this constitution, there shall be submitted at the next general state election upon a separate ballot the question of sustaining such decision of the Supreme Court in form:

Shall the decision of the Supreme Court holding invalid an act entitled be sustained? Yes. ☐ No. ☐

"If a majority of the votes cast at such election be in the negative such act shall be law notwithstanding said decision of the Supreme Court, and said court and all others

shall be bound to enforce said act; but nothing in said act contained, or the popular vote thereon, shall for any other purpose be taken as an amendment to, or precedent for the construction of, this constitution."

This form of amendment is effective for the purpose and as little objectionable as possible. Any act "purporting to be an exercise of the police power," whether or not according to present accepted views it be a proper exercise of police power, is included. It would seem to be necessary to make such a provision because now, when an act is an exercise of the police power it must be sustained, notwithstanding it may incidentally infringe upon some of the constitutional rights of private individuals; and if the amendment should merely provide that only when an act which is indeed an exercise of police power should be held unconstitutional it might be reviewed, the present situation would not be changed. But if there were such a provision in the constitution, is it putting too low an estimate upon the integrity, or too high an estimate upon the ingenuity, of legislators to suggest that every act suspected by its framers of having constitutional defects would contain in its preliminary recitals of the dire difficulties it aimed to correct with multiplied references to the health, safety, morals, good order and general welfare of society?

But, it is asked, why should not a majority of the people, from whom the constitution is itself derived, have the power to amend or construe even to the extent of destroying rights preserved by the Bill of Rights, by such piecemeal amendments or construction, instead of by amendments in general terms?

The federal Constitution has no Bill of Rights. Before the adoption of the last three amendments, while the states were forbidden to make anything other than gold and silver legal tender, to pass a bill of attainder, ex post facto law or law impairing the obligation of contracts, there were practically no other limitations on the power of a state in dealing with its own citizens. Even since the adoption of the last three amendments, it may be doubted if there is anything in the Federal Constitution restraining a state from enacting laws limiting religious liberty, freedom of speech, right of trial

by jury, or authorizing unreasonable searches and seizures, denying the writ of habeas corpus, compelling one to incriminate himself, authorizing transportation from the state for crime, imprisonment for debt, or an irrevocable grant of special privilege, or denying a certain and speedy remedy in the law, rights which with more or less particularity are protected by each state constitution. It will not answer, therefore, to say that the Fourteenth Amendment would protect against deprivation of rights now guaranteed by state constitutions. These great constitutional guaranties have become so commonplace that people have almost ceased to think of the necessity of maintaining them, but history is too full of the crimes committed in the name of religion, for instance,—offences to which unrestrained majorities are peculiarly prone,—to justify the making of any change in fundamental law would put in jeopardy these safeguards.

It may be suggested, however, that the difficulties presented can be met by changing the proposed amendment so that instead of permitting a recall of a decision holding unconstitutional a purported exercise of the police power under any provision of Bill of Rights, such recall shall be indulged only when the act is held unconstitutional on the ground that it deprives one of life, liberty or property without due process of the law under the state constitution, or when it is held unconstitutional under any provision of the federal Constitution. If the proposed amendment should take this form, it may be argued that rights will be secure because the recall would apply only to cases in which there would exist a right of review on writ of error to the Supreme Court of the United States, and that that court may be safely relied upon to enforce the property and liberty rights guaranteed by the Fourteenth Amendment. If this be the idea, why would not the same end be attained much more expeditiously and less expensively by eliminating from the state constitutions the clauses forbidding deprivation of life, liberty or property without due process? If the ultimate protection for these rights must be in the federal tribunals, why create elaborate machinery upon which the highest court of the state shall first be called upon to act, its judgment set aside upon a referendum, and a new liti-

gation started which must wend its weary way to the Supreme Court of the United States? Are Americans prepared to say that it is wise political doctrine that the states shall not set up and guard their own respective constitutional liberties? Has the process of centralization, which has made such rapid strides in the last fifty years, gone to the point where we are prepared to modify our theory of a federation? Does it seem like the doctrine of a pure Democrat to remove from the determination of an elective state court the liberties of her citizens and rest them for final disposition with a tribunal in the selection of which they have only a remote and contingent influence? It may be that the American people have advanced to a stage of stability and civilization where such a device would be safe, but it is unnecessary, unwise and shocking to the sense of anyone who understands and believes in democratic government.

There was recently circulated in Chicago a copy of a letter by ex-Judge Grosscup in which he stated that his understanding of the proposal was that after an act had been held unconstitutional it should be re-submitted to the legislature and then if repassed should be submitted to the people,—an interval of two years to elapse. The act when approved by the people then becomes constitutionally excepted from the constitutional prohibition, the prohibition in all other respects standing as before. This, Judge Grosscup points out, would be amendment and not construction, the exercise of legislative and not of judicial functions by the people.

Does the proposal even in this form and confined to acts held unconstitutional as depriving of life, liberty or property, so that there would still be a right of review in the Supreme Court of the United States, offer an improvement over present methods? It is not doubted that the American people is capable of self-government. One hundred and twenty-five years of successful political institutions and advancing civilization attest it. But no widely scattered and highly varied people is capable of the details of self-government. Experience teaches that the American people, like other people, are better judges of men than of principles, and better judges of general principles than of modifications

or refinements of principles. The surgeon must have my consent before he has the right to operate, but my consent does not confer the skill to operate. The consent of the people is essential to the right to judge, but their consent does not furnish the ability to judge.

All agree there is no more valuable right than that of religious liberty. If the people of any state in the Union to-day were called upon to vote "Yes" or "No" upon the adoption of a religious liberty plank to their constitution, if it had none, they could safely be counted upon to give an overwhelmingly affirmative vote. But suppose there should be submitted to the people the question of whether some one particular religious sect should have freedom of worship, would the vote be so overwhelmingly affirmative? The intelligence of our people and their interest in its general application may be relied on to support the proposition that no man shall be deprived of life, liberty or property without due process of law; but could their negative vote be so confidently counted upon if there were a proposal to take the property of one unpopular corporation and devote it to an unquestioned public good? Every man will vote "no" to the proposition that the constitution shall be so formulated that his property or liberty may possibly be taken without due process of law, but would the same man so surely vote to support a decision of the Supreme Court holding void an act requiring a Stock Yards Company without compensation to convert a section from the middle of its yards into a playground for the children of that congested neighborhood?

When general propositions affecting all men alike are submitted to our vote, we are impelled by a combination of patriotism and fairness, with self-interest, to declare in favor of that which makes for righteousness; but it would be a most dangerous expedient to remove from the control of men trained by tradition and experience to weigh the rights of others and submit to a general vote, perhaps in time of great popular excitement and prejudice, the rights of a small group of men whose interests might, for the time being, seem opposed to the welfare of the community at large. Those active in affairs have impressed upon them

daily that it is as necessary to know what the law is as that the law should be this or that. If this be true as applied to the ordinary commercial affairs of life, the daily dealings of men with men, how much more important is it that a citizen should know with certainty what are his fundamental rights as between himself and his government.

The theory of a written constitution is that it embodies certain general fundamental and enduring principles essential to liberty and creates a machinery of government for their maintenance. With changing economic conditions come inevitably changes in current economic thought, which naturally tends to express itself in law. If shifting theories are to be embodied not in plastic statutory law, but in rigid constitutional law, not only will there be an abrupt departure from the theory of the written constitution, but we shall have entered upon a work of endless confusion. An elaborate employers' liability act, for instance, is made a part of the constitution; not only its general principles, but all its details, are endowed with constitutional vigor. After a few month's experiment one of its provisions proves unwise, or perhaps in conflict with another provision. The constitution must be amended! What was wanted was more flexibility; the result, more rigidity! It would not be many years before a state constitution would look like a crazy quilt, nor many more before parts of it would be no more useful or ornamental than the lithograph of a defeated candidate the day after election.

No court is infallible. Popular criticism of judicial decisions is not only a sign, but a necessity, of healthful political life. It may be agreed that many state courts have made grave mistakes in law and in policy, in holding repugnant to the Fourteenth Amendment and similar provisions in the state constitutions, many remedial acts. In construing an act with the constitution a court is confronted with a problem other than that which would be presented by a comparison of two contracts or even two statutes; there must be more than academic divergence or literal conflict before the act can be held void. "It (the court) can only disregard the act when those who have the right to make laws have not merely made a mistake, but have made a

very clear one—so clear that it is not open to rational question.”* But tested even by this broad standard do the criticised cases afford even a plausible pretext for a radical change in our institutions?

In the so-called “Tenement House” case,† the act under consideration forbade the manufacture of cigars or the preparation of tobacco in any form in a tenement house situated in a city of more than 500,000 inhabitants, and defined a tenement house as a building in which more than three families had separate apartments where they did their cooking. In the case under consideration the defendant lived with his wife and two children in an apartment house of seven rooms in a building in which there three other apartments of equal size. Under the act it would have been an offence for a gentleman occupying an apartment on Riverside drive to roll a cigarette or mix a bowl of pipe tobacco. One would think that criticism of the lack of skill in drafting the bill would be more pertinent than taxing the court which declared it unconstitutional with being out of touch with life and more in sympathy with property than humanity.

Of the “Bake-shop” decision,‡ so much decried, the only significant feature is that the statute was sustained by the state court whose decisions would be subject to recall and declared void by the Federal court which is to remain beyond the reach of review.

In the Carnegie Hall speech the Ives case, ** in which the New York Employers’ Liability Act was held unconstitutional, received especial condemnation. The speaker asserted that similar laws have been held constitutional by the Supreme Court of the nation and several courts in various states. This assertion will bear analysis. The New York act was not elective, that is, it did not give the employer an election whether or not to be governed thereby. It applied to certain occupations declared to be especially

* 7 Harv. L. Rev. 129. Origin and Scope of the American Doctrine of Constitutional Law. Prof. J. B. Thayer.

† In re Jacobs, 98 N. Y., 98.

‡ People v. Lochner, 177 N. Y., 145, 69 N. E. 373; Lochner v. New York, 198 U. S., 45.

** Ives v. South Buffalo Ry. Co., 201 N. Y., 271; 94 N. E., 431.

dangerous, and, roughly stated, provided that if a workman suffered injury caused by the necessary risk or danger of the employment or negligence, the employer should compensate the injured employee according to a fixed schedule. The act retained to the workman his common law rights of suit unless he availed himself of the act.

In general, law recognizes only two classes of rights as between individuals, those arising from contract (*ex contractu*) and those arising from a breach of duty imposed by law (*ex delicto*). This act imposed no new duty for the breach of which a remedy was given. The question presented to the court was whether it was competent for the legislature to compel A. to pay money to B. when A. was not under contractual obligation to B. to pay such money, and had violated no duty imposed by law. Conceding the broadest powers to the legislature and recognizing the extreme delicacy of the power of the court to review, the most ardent humanitarian on the bench must needs have some hesitancy in declaring that because of some supposed or real benefit to the community at large, one man or one class of men may be compelled to contribute directly to the support of another man or another class of men to whom no contractual or tortious relationship is sustained. The Court of Appeals of New York in a long and able opinion arrived at conclusion that this may not be.

It is not true that similar laws have been before either the Federal Supreme Court or courts of several states. The Employers' Liability Law[†] passed on by the Supreme Court of the United States did not purport to impose any such liability. It merely took away some of the common law defences, but still left the employer liable only in the case of negligence. The principal question passed on by the federal court was whether the act was a proper exercise of the constitutional power to regulate interstate commerce. The constitutionality of an attempt to impose liability without breach of either contract or duty was not decided; it was not even presented for consideration.

[†]Second Employers' Liability Cases, 223 U. S., 1 (Feb. 15, 1912).

Employers' Liability laws have been before the Supreme Courts of Washington,* Wisconsin† and Ohio,‡ and the Justices of Massachusetts** have rendered an opinion to the legislature on the proposed act of that state. Only the Washington act can, by any stretch of the imagination, be said to be similar in principle to the New York act, and it is sufficiently dissimilar so that the same court might easily sustain the one while refusing to countenance the other. Under the Washington act employers are compelled to contribute to a State Insurance Fund, the amount of their contributions being based upon their pay-rolls. The right of the employee against the employer is taken away, and in lieu thereof he is allowed compensation by the state out of the Insurance Fund.

The Ohio act compels nothing, but merely permits the employer to contribute to the State Insurance Fund, in which even he is exempt from suit. If he does not contribute the three defences of contributory negligence, fellow servant and assumption of risk are barred.

The Massachusetts, Wisconsin and Illinois acts are similar in principle, imposing no liability upon the employer other than that now recognized by law, but depriving him of the three defences unless he elects to come under the act.

The radical difference in principle between the New York act and all the other acts, with the possible exception of that of Washington, is obvious, as is also the lamentable inaccuracy of calling these acts similar for the purpose of justifying criticism of the New York court.

If no social development were possible without a change, possibly the dangers threatened might be braved. But courts respond, slowly, indeed, but none the less surely, to public opinion, which *non obstante verdicto* needs but little time to force its conclusion in one way or another. It was not long after the Supreme Court had said that Congress had power to establish a National Bank until there was no

* State ex rel. Clausen (Wash.) 117 Pac. R., 1101.

† Borgnis v. Falk Co. (Wisc.) 133 N. W. 209.

‡ State v. Creamer (Ohio), 97 N. E. 602 (Feb. 6, 1912).

**Opinion of Justices (Mass.), 96 N. E., 308 (June 24, 1911).

National Bank. As at present constituted, it is almost certain that the Supreme Court of the United States would not repeat the "Bake-shop" decision. If the State of New York desires to prevent the manufacture of cigars under unsanitary conditions, there is nothing in the decision of *In re Jacobs* to prevent it. If the people of New York wish an Employers' Liability Law which will accomplish all that would have been accomplished by the act held unconstitutional, four other States have shown how to get it.

In 1895 the Illinois Supreme Court held that the legislature could not restrict the labor day of women to eight hours.* In 1910 they held that they might restrict such hours to ten,† and quoted with approval from the Supreme Court of Washington a sentence which well expresses the flexibility of our present system and consequent lack of need of radical change:

"Law is or ought to be a progressive science. While the principles of justice are immutable, changing conditions of society and the evolution of employment make a change in the application of principles absolutely necessary to an intelligent administration of government."

The effort to intimidate thoughtful and prudent men by charging them with being enemies of the people cannot relieve the proposal from analysis. Neither should innovation be resisted by an appeal to the sacredness of our institutions. Our government is rational, and to the rationalist nothing is sacred in the sense that it is saved from scrutiny. Our present institutions are not necessarily right because they exist, but neither is the proposed change good because it is new. The burden is on the proponent. Tested by reason and by the experience of history, it fails to persuade.

The proposal is vicious because, to the extent they are not shielded by the federal Constitution, the rights of the minority would be subjected to the unrestrained will of the majority and, to the extent that the federal Constitution does protect, the sense of self-government would be weakened by making the people rely upon the Supreme Court of

* *Ritchie v. People*, 155 Ill., 98.

† *Ritchie v. Wayman*, 244 Ill., 509, 530.

the United States instead of their own state courts for the protection of their most fundamental and dearly prized rights; it is vicious because it would result in a patchwork constitution, no longer the succinct expression of enduring principles but the reflection of passing economic theories, creating greater difficulty rather than more ease in adaptation to changing conditions; and finally it is vicious because it opens the gate to our most carefully cultivated garden, that it may be trampled by the demagogue.

Central Law Journal. 75: 35-40. July 12, 1912.

Recall of Decisions—A Fallacy. James B. McDonough.

The recall of decisions is a mere political outcry, resulting in the main from five classes of decisions all made in the last seventeen years, for which, if we blame the judiciary we must blame Congress and the people of the states the more. They are: (1) The Income Tax Decision; (2) The Railroad Rate Decisions, holding that the state legislatures could not destroy property by reducing railroad rates below the point of a fair return; (3) the granting of injunctions in labor disputes; (4) the unsatisfactory results from the decisions in the Northern Securities, the Standard Oil and the Tobacco Trust cases; and lastly and most important, the constitutional decisions holding acts of the legislatures of the states void, as in the celebrated *bake-shop* case.

The wrongs flowing from these classes of decisions cannot be righted by the recall, and they are not sufficiently serious to warrant the destruction of our judicial system. Every real wrong growing out of any of these decisions could have been, and can now be easily and speedily remedied, either by an Act of Congress, or by a constitutional amendment to the state or federal constitution.

To recall a decision which has declared an act of the legislature void, is to reverse, by popular vote, the judgment of the court, thus holding the act valid and giving a money judgment in favor of the party who lost in the court. Therefore, the plan is to have the whole people, by a pop-

ular vote, on an appeal to them from the courts, give a money judgment or impose a fine or imprisonment. Hence, at the very threshold, the plan adds another burden on litigants,—a delay by giving another appeal to those already existing. If one side may appeal when the law is held void, then the other side may appeal when the law is held valid. The fundamental principle of equal rights and the equal protection of the laws, a principle that is older than constitutions, demands that if one party have a right of appeal to the people from the courts, the other party must also have the same right. Hence the addition of the scheme of the recall of decisions to any constitution adds from six months to five years delay to every law-suit in which the constitutionality of a statute is involved. In the case of *State v. Handlin*, 7 Ark. Law Reporter, 411, the constitutionality of the inheritance tax law of Arkansas was drawn in question. The act was upheld, thus sustaining a source of revenue for the state. If the recall of decisions had existed in Arkansas, all heirs, legatees and other beneficiaries from the estates of deceased persons would have appealed from the court to the people and the case would now be before the people for decision, its constitutionality depending upon whether a majority of the voters are heirs and legatees or non-heirs and non-legatees. Every heir and every beneficiary of an estate who is a qualified elector would vote on this constitutional question in accordance with his financial interest, thus becoming the judge and jury in his own case, thus establishing a vicious system which is contrary to natural justice.

But the advocates of the recall of decisions say that this is an extreme view and that it will not be used in ordinary suits between individuals. It will be so used, because ninety-nine hundredths of all constitutional questions arise only in ordinary suits between individuals, wherein one party seeks to recover a money judgment against the other.

The recall of decisions is nothing more nor less than an abrogation of the constitution. It is government without any constitution. Hence, it is a plain, undisguised assault upon government by written constitution. It provides a method of amending the constitution contrary to the very

instrument itself, and thus invites a people to violate their own organic law, and thus weakens the respect for law. It is not intended by this to say that a constitution is too sacred to be changed, but it is intended to say that a constitution in so far as it protects human rights and preserves the blessings of life, liberty and property, thus affording a sound and stable government for a great and free people, should not be utterly destroyed by a scheme that appeals to the passions and prejudices of the people. As such a scheme destroys the constitution, it in effect destroys the judiciary and leaves the government in the hands of ambitious executives and accommodating legislative assemblies, or the people led by a national hero.

With such a system, as the recall of decisions, the judges would forget that there was a constitution, and they would be found ascertaining in some way, unknown to the law, the prevailing morality and the preponderant opinion of the people, holding a law valid or invalid as they might believe the people thought. Hence the minds of the judges would be put to work to ascertain the views of the electorate rather than base their rulings upon sound principles of justice and constitutional law. Every honest and upright judge believing his opinion to be sound, would want it sustained, and being human, his mind under such a system would necessarily make some effort to ascertain what the people thought rather than what the law is, thus making political trimmers of all judges.

The advocates of the recall urge an amendment to the state constitution, knowing that such an amendment to that constitution will not give any relief, since if the workman's compensation laws and other laws intending to right social wrongs and industrial injustice are void because they "contravene the inviolability" of life, liberty or property, then they are void because in conflict with the national Constitution, and any offer to cure the wrong by an amendment to the state constitution is to offer a stone when labor demands bread.

An examination of the cases criticised, illustrates this.

Take the case of *People v. Williams*,¹ decided in 1907. The defendant was charged with a misdemeanor by permitting a woman to work in his factory between the hours of nine o'clock p. m. and six o'clock a. m. The law of New York, which prohibited the employment of females, regardless of age, in factories, between the hours named, was held void because it infringed the liberty of contract clause of the state constitution, the court holding that the act did not limit the hours of labor of women, but merely prohibited their working between certain hours. The fault lay with the legislature in passing a clumsy law. If the law had limited the hours of labor for women, it would have been upheld as the Supreme Court of the United States upheld the Utah Mining law,² which limited the hours of labor of miners to eight hours per day, and as the same court also upheld the law of Oregon, which limited the hours of labor of women in laundries to ten hours per day.³ These decisions by the Supreme Court of the United States demonstrate that the states may pass proper laws for the protection of the working classes and the improvement of labor conditions.

This Williams case, above cited, was decided by the Court of Appeals of New York, in 1907, and the Oregon law, limiting the hours of labor of women in laundries, was upheld by the Supreme Court of the United States, in February, 1908, that court holding that the law was a proper exercise of the police power. In that decision by the Supreme Court of the United States the remedy of the people of New York is plainly pointed out, to-wit, the passing of a law like that of Oregon. This could have been done before the close of the year, 1908.

If the Williams decision was so destructive of human rights, and so disastrous to real reforms in labor conditions, it is passing strange that the "statesman" and politicians who are building a structure of political power ostensibly to right social wrongs and industrial injustice, should have permitted these wrongs to continue more than four years

(1) 189 N. Y. Rep. 131.

(2) *Holden v. Hordy*, 169 U. S. 366.

(3) *Muller v. Oregon*, 208 U. S. 412.

unrelieved, when a speedy remedy was so easily within reach. Have they ever made any effort whatever to have the legislature of New York pass the necessary law to remedy the evil of the Williams case? None whatever, and yet as is shown in the Oregon case, the remedy is as simple and open as the noonday sun. Is there any good reason why the open, plain and real remedy should be neglected, and the energies of these leaders be spent in the abuse of the courts? The only reason is that to apply the remedy would kill the goose that lays the golden egg of political agitation and power.

After four years of fruitless agitation over a decision whose evil could have been cured in six months or less, as a remedy it is now proposed to recall such decisions and hold the law valid, thus wasting from three to five years during which there is much suffering for the masses and vote-getting for the statesmen. If a case like the Williams case is reversed under this scheme, it necessarily means the conviction by popular vote of the defendant and the assessment of a fine or money judgment or imprisonment, or both. Such a fine or imprisonment by popular vote is making an act a crime, which was not a crime, when done; and hence the recall of such a decision is an *ex post facto* law, and void because prohibited by the national constitution.

The same is true of the *Lochner* case which is better known as the *bake-shop* decision, which caused Mr. Roosevelt to charge that courts were steeped in outworn philosophy, and that they upheld "festering" wrongs, and were bulwarks of privilege, in which case the law was upheld by the New York Court of Appeals, which decision was reversed by the Supreme Court of the United States the latter court holding the law void; and also the *Ives* case in which the workmen's compensation law of New York was held invalid by the New York court, because in conflict with the state constitution. These are the cases which the opponents of stable constitutional government say have made the recall of decisions necessary.

If the workmen's compensation law of New York is in conflict with the Constitution of the United States as the

Court of Appeals of New York actually decided, though the court's opinion was ultimately grounded on the state constitution, the amendment to the state constitution or the recall of the decision would be valueless, and worse. It would deceive the honest reformers who believe they were getting a valid law. No amendment to a state constitution or recall of a state decision can amend the national constitution. That can only be done by three-fourths of all the states. Hence the recall of decisions by the vote of the people of the state, as applied to such questions, is a delusion and a snare. It may secure votes, but in return the oppressed toiler gets nothing. He still makes brick without straw. The remedy, therefore, is not to amend the state constitution or recall state decisions, but to amend the Constitution of the United States, authorizing the states to pass the necessary laws for the protection of the laboring classes; and this cannot be done by the recall of decisions in a single state. If the state constitutions prohibit such laws, they too may be amended. This does not mean opposition to workman's compensation laws. It simply means that such laws should be adopted in a constitutional way and after careful study and mature deliberation.

It is true that the people rule and that they make and unmake constitutions at will. They make constitutions by selecting their wisest and best men as delegates to a convention, where the constitution is framed and afterwards submitted to the people for rejection or adoption. In that way constitutions are made without appealing to class hatred and prejudice and personal interest. In the practical operation of a recall of decisions, constitutional and sound governmental principles will not be studied, will be lost sight of in the turmoil and conflict over the justice or injustice of the particular decision.

Take the Ives case again. The concrete question before the voters would be: Shall the widow and children recover for the husband and father's death? The voters would be divided into two classes on nearly all propositions,—the employers and the employed. Class hatred and feeling would be aroused to the danger point. The attorneys who won and lost a case before the courts would feel compelled

to take the hustings in their clients' behalf. The clients would be compelled to bear great expense in printing and in circulating elaborate briefs to show the justice of their causes. If this expense should not be upon the litigants, would the state bear the same? Would the counties or the municipalities be responsible for printing the arguments and the literature to be circulated among the people? It is idle to say that no such printed arguments and information would be necessary. The courts find it necessary to have the arguments printed and usually oral arguments are made, and these arguments are necessary in order that the court may properly pass upon the questions. The judges are trained students of legal problems. Notwithstanding that, they require printed and oral arguments in order to aid them in coming to correct conclusions on difficult legal problems. Therefore, the elector who suddenly finds himself burdened with intricate constitutional questions, will necessarily need learned arguments. These arguments cannot be made, and printed, without great expense. In addition to that, the judges themselves, having confidence in the correctness of their decisions, would necessarily be drawn into the fight. The questioned decision might affect one county or two counties, or it might affect the entire state. A decision that would advantage one county, would injure another. Hence the different parts of the state would be arrayed, one against the other. In addition to that, different states would recall different decisions. A decision that would be satisfactory to a manufacturing community would be unsatisfactory to an agricultural community. Mining districts would also have different views. The result would be that uniformity of laws would be utterly destroyed.

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Development of American Constitutional Law. Munroe Smith.

As the "recall" proposal was originally presented by Mr. Roosevelt, the referendum on decisions was not, apparently,

to be limited to due-process cases; it was to be available whenever a state law was declared to be invalid because in conflict with any provision of the state constitution. In view, however, of the inconvenient and even absurd results that might possibly be produced by an unlimited "recall," it is now proposed that referenda on decisions shall be limited to due-process cases. The proposal is so formulated, for example, by Mr. William L. Ransom in his recent book on *Majority Rule and the Judiciary*, to which Mr. Roosevelt contributes an introduction.

In order that we may see how this limited "recall" would probably work, let us take a situation which has already been much discussed, which has been frequently chosen by the advocates of the "recall" to illustrate the need of a new remedy, and which Mr. Ransom claims would be remedied by a "recall" limited to due-process cases. Let us take the situation which exists in New York as regards compensation of workmen, or of their widows and children, in cases of injury or death caused by industrial accidents. A law passed by the state legislature was pronounced unconstitutional by the Court of Appeals, because it proposed to take the money of the employers without due process and was not within the sphere of the police power. It is claimed that a "recall" limited to due-process cases would have sufficed to validate the law and make it immediately effective. But, in pronouncing this law unconstitutional, the New York Court of Appeals declared that, for the purpose of reaching a decision, it was not necessary for the court to determine whether the act was unconstitutional solely as denying due process. It declined, in particular, to decide whether it was unconstitutional as denying the employers' right to trial by jury. It seems clear, therefore, that even if the decision of the court had been "recalled," the law would have been validated only so far as due process was concerned, and that the question which the Court of Appeals declined to decide would remain open. If, when this issue was raised, the Court of Appeals should again declare the law unconstitutional, it would apparently be necessary under the limited-recall program, to introduce a new amendment to the constitution, widening the scope of the recall, and to institute

a new referendum. If the new amendment were limited in its application to the matter of jury trial, it is not impossible that the question might arise whether the law was not in conflict with some other provision of the constitution, or with the general spirit of the constitution.

So numerous are the grounds upon which any law that attempts to realize what is to-day described as "social justice" may conceivably be pronounced unconstitutional, that it will be no easy task to frame a recall amendment that will cover all these grounds and yet remain limited in its scope. It seems doubtful, to put it mildly, whether any recall proposal thus far formulated promises to secure a more speedy adaptation of our state constitutions to changing conditions than the existing process of substantive amendment. It seems highly improbable that it will bring to a more prompt and satisfactory conclusion any differences of opinion or of sentiment between the state courts and the state electorates. For a single political battle, terminated by a single substantive amendment, the limited "recall" appears to substitute, primarily at least, a prolonged political war, in which the electorate would realize its intention only after several campaigns. Moreover, after each campaign, the limited recall would be widened in its operation; and it would thus gradually approach that unlimited recall which the supporters of the plan do not at present advocate.

A more fundamental objection, which applies to any conceivable form of referendum on laws pronounced unconstitutional, is that it offers us a crude and unsatisfactory means of obtaining the end desired. The purpose of the proposed referendum is to obtain, particularly in matters of natural right, popular expressions of the sense of social justice. Such expressions are to create precedents which the state courts are to follow. It is however, extremely improbable that the electorate will consciously attempt to express its sense of social justice. The great majority of the voters will express their varying judgments as to the probable effects, good or bad, of the particular measure submitted to them. If it be replied that the majority judgment will contain, by implication, an expression of its prevailing sense of

justice, it may be remarked that implications are matters of opinion, and that widely different implications may be discovered in every such popular decision. After every general election there appear widely different theories as to what was really "the verdict of the people." It may be added that successive referenda on different measures may well contain implications that cannot easily be reconciled. The difficulty which the courts now experience in determining the true reasons for their own decisions on constitutional questions will appear slight indeed in comparison with the difficulty which they will encounter if they be called upon to determine, first, what intuitions of social justice seem to be implied in a series of popular decisions, and, second, what rules of constitutional interpretation can be formulated that will express these intuitions. To the average lawyer such a process of developing law seems fantastic; hence the generally hostile reaction of the legal profession to the "recall" proposal. To the student of legal history, on the other hand, the process is not fantastic but familiar. It was by this very process—the expert interpretation of popular decisions—that law was taking form in the Mediterranean city-states twenty-five centuries ago and again among the Teutons fifteen centuries ago. If the reaction of the legal historian to the proposal is also hostile, it is not because the process seems novel but because it is seen to be archaic. Like the whole direct-government movement, of which it is a product, it is a reversion to the primitive processes of early civilization.

It is not yet formally proposed to apply a popular "recall" to the decisions of the federal judiciary; but there have been suggestions that, if the system should be introduced and should approve itself in the several states, it might be extended to the nation. The chief difficulty which will be encountered by anyone who endeavors to formulate a proposal for the submission of constitutional questions to the people of the United States is that, in public law, the people means the electorate, and that there is no national electorate. Nor can the forty-eight state electorates fitly be recognized for any purpose whatever as a national electorate. The conditions on which the different states grant the right to vote

are so diverse that a popular majority obtained in a nationwide vote would neither deserve nor receive serious consideration. Such a majority might possibly be due to the fact that in nine or ten states the total vote, and consequently the majorities recorded, were doubled by woman suffrage. It might be due to the fact that negroes, who vote freely in the northern and western states, are practically excluded from the suffrage in the southern states. To the total affirmative and negative votes of these forty-eight electorates no legal significance could reasonably be attached unless the conditions of voting were equalized. A "recall" of the decisions of the federal judiciary could, of course, be legalized only by constitutional amendment. Unless such a proposal carried with it the further proposal that Congress be empowered to determine who should vote, it would assuredly be rejected because of its absurdity. If it carried with such a further proposal, it would probably be rejected by the votes of the southern states alone, even if the rest of the country favored it. For these reasons, if there were no others, the "recall" of federal judicial decisions must be regarded as a matter of speculative interest only. For the present, at least, it is not in the realm of practical politics.

Annals of American Academy. 43: 239-77. September, 1912.

Judicial Recall—A Fallacy Repugnant to Constitutional Government. Rome G. Brown.

Ex-President Roosevelt cites Australia as a country where the powers of the courts, as exercised in the United States, find no parallel. As pointed out by Justice Burch of the Kansas Supreme Court in a recent address, it is the instance of Australia which shows a deliberate adoption of our constitutional methods and of the very powers of the judiciary which are now widely made the subject of denunciation. As late as January, 1901, upon the address of all the Australian colonies to the British Crown, there was put into effect, for the government of the people of the entire Australian continent, a written constitution modeled upon that of the United States of America.

For five years representatives of the colonies had discussed with the greatest learning and research the merits and demerits of different forms of government as shown by the experience of parliamentary systems of government and of that of the United States and other countries, with the result that the American precedent became the guide and model of a new continental government. It followed closely, in many respects, the American model in its separation of federal and state authority, and in its division of power between the three separate and independent legislative, executive, and judicial departments, and, what is more important, with a federal judiciary as the supreme interpreter of the Constitution and with the Constitution as the supreme law of the land. And for 10 years prior to the time when ex-President Roosevelt was claiming a repudiation by Australia and other nations of the world of the power of the judiciary to prevent enforcement of a legislative statute as repugnant to the supreme written law of the land, the courts of the Commonwealth of Australia had, following the precedent of decisions of the Supreme Court of the United States, been declaring numerous statutes, even some affecting human rights from a vital standpoint, "*ultra vires*," that is, unconstitutional. Such decisions included those declaring invalid the federal act establishing a worker's mark, passed in the interests of union labor, as an invasion of the separate powers of a state over domestic commerce and industry; a federal act attempting to control disputes between employer and employee on state railways; and an excise tariff act by which it was attempted indirectly to secure to workmen a share of the profits accruing to employers from protection taxes.

Another incident which has been overlooked by the chief American advocate of the recall of judicial decisions is that the measure of the appeal to the people from the decisions of the courts on constitutional questions was, over a decade ago, presented to the Australian constitutional convention, and although fully debated, received no substantial support except from the member proposing it and was finally withdrawn. It was unanimously agreed that this indirect method of amending or modifying the constitution was inconsistent with the form of government proposed, which gave ample opportunity

discuss and de- the ex- that hat th- w con- spect- i stat- thre- udica- al, p- I wil- for a- claim- woul- legat- f the- for- the- om- es- de- ark- the- in- to- a- :
for all proper amendment by methods requiring deliberate action.

Any measure by which there is given to the people of a locality the direct power of adjudication upon a constitutional question means the elimination of constitutional limitations and safeguards established for the security of liberty of person and of property. In place of methods of careful and deliberate amendment of constitutions it substitutes the spasmodic, vacillating, and inconsistent expressions made from time to time of the arbitrary will of a majority temporarily in power. It substitutes for decree of judgment under the law the spasmodic will or caprice of the mob. I use the word "mob," which in similar instances never refers to the people generally, but to large numbers of the people, and it may be at times a majority, acting under the influence of passion and prejudice and against their own real interest, as distinguished from the people acting through forms and procedures of law, established with provisions safeguarding against the result of temporary passion and prejudices and operating in such a way and under such conditions as ultimately shall insure expression of the calm, sober, deliberate judgment of the people as a whole. The term so used is not a denial but an affirmation, under a constitutional democracy, of a sovereignty vested in the people.

It is unnecessary to give instances of the opportunities of the abuse of the power of popular adjudication upon constitutional questions. We may not overlook, however, the instance of Wisconsin where, preceding the year 1911, a state-wide agitation had been made by an appeal to the passion and prejudice of the voters, to demand a statute by which a large class of property owners within the state, whose title to their property had been confirmed by repeated adjudications of the state and federal courts, should have their property taken from them by a legislative fiat and, by the same token, established in the state itself for general public use. The movement, denominated in Wisconsin as "progressive," was successful, and the Wisconsin Legislature of 1911 passed the now notorious water-power act, the provisions of which within a year were each and

all, including the spirit and purpose of the act itself, declared unconstitutional by the Wisconsin Supreme Court as repugnant to several provisions of not only the state but of the federal Constitution. No lawyer or judge, acquainted with the first principles of the law of property rights or of constitutional law, will pretend to criticize that decision. Nevertheless, such was the prejudice which had been aroused throughout the state in favor of the confiscatory statute, there is no doubt that, if the recall of judicial decisions had been there applicable, the people of the state would have voted within the time required for such a vote, and probably would to-day so vote, that the decision of the Wisconsin Supreme Court should not stand. By such popular adjudication, if it had been made in Wisconsin, the statute in question would have been sustained and would have remained effective until the question could be brought before the federal Supreme Court in the same or in a similar case; with the result that that which is one day property in possession of its owners would, for a long period, become not their property but would be retained in the possession and control of the state; and after the end of a further period, when judicial judgment under the law finally reigns in place of the drastic and arbitrary decrees of popular passion, the same property would again have been returned to its legal owners.

It is futile to claim that the establishment of the recall of judicial decisions would be consistent with the retention of constitutional government, or that its purpose and effect are any other than to eliminate constitutional safeguards. Even in attempting to answer the charge of President Taft that the proposed new system "would result in suspension or application of constitutional guaranty according to popular whim," which would destroy "all possible consistency" in constitutional interpretation, ex-President Roosevelt expressly referred, in his Carnegie Hall speech of March 20, 1912, to the system criticized as one "amending or construing, to that extent, the Constitution"—that is, to the extent of leaving the enforcement of any constitutional provision to popular vote. The supporters of his proposition, including a well-known publisher and editor, frankly

assert that the people within the jurisdiction of any constitution should, as sovereign rulers and as the makers of the constitution itself, have the power at any time by majority vote to amend—that is to “disregard”—such constitutions, and that the recall of judicial decisions is sufficiently justified because it will have precisely such effect.

The system of a recall of judicial decisions is inconsistent with our system of government. These two conflicting systems can not exist together. As stated by the Hon. Elihu Root in the speech which he delivered as president of the New York State Bar Association on January 19, 1912:

We must choose between having prescribed rules of right conduct, binding in every case so long as they exist, even though there may be occasional inconvenience through their restraint upon our freedom of action, and having no rules at all to prevent us from doing in every case whatever we wish to do at the time. We can not maintain one system in part and the other system in part. The gulf between the two systems is not narrowed, but greatly widened by the proposal to dispense with the action of a representative legislature and to substitute direct popular action at the polls. A sovereign people which declares that all men have certain inalienable rights, and imposes upon itself the great impersonal rules of conduct deemed necessary for the preservation of those rights, and at the same time declares that it will disregard those rules whenever, in any particular case, it is the wish of a majority of its voters to do so, establishes as complete a contradiction to the fundamental principles of our Government as it is possible to conceive. It abandons absolutely the conception of a justice which is above majorities, of a right in the weak which the strong are bound to respect. It denies the vital truth taught by religion and realized in the hard experience of mankind, and which has inspired every constitution America has produced and every great declaration for human freedom since Magna Charta—the truth that human nature needs to distrust its own impulses and passions, and to establish for its own control the restraining and guiding influence of declared principles of action.

The occasion for the suggestion of the recall of judicial decisions, as outlined by its chief advocate, lies in the peculiar fact that in cases where a state statute is claimed to be repugnant to the federal Constitution, and its validity is upheld as against such claim, then such decision is directly reviewable by the federal Supreme Court; whereas, if the decision is against the validity of the statute and in favor of the claim of its repugnancy to the federal Constitution, such decision is not so reviewable. This is because of the peculiar provisions of the act of Congress by which the appellate powers of the federal Supreme Court are fixed; and the distinction is undoubtedly made so as to avoid as far as possible an unnecessary increase of the number of

cases which would otherwise come before the federal appellate court. For a long time representative lawyers of the country have considered this discrimination in allowing appeals as unwise; and the American Bar Association and many leading lawyers have been urging upon Congress the desirability of changing the judicature act so as to render possible the review by the Federal Supreme Court of all decisions of a highest state court, which determine to be either valid or invalid a state statute on the issue of its repugnancy to the Federal Constitution. It is for the people through their representatives in Congress to say whether the remedy which is thus possible shall be adopted. It would be a logical, efficient, and direct remedy for any evils for the cure of which the recall of judicial decisions is urged. Therefore, besides objections to the recall of judicial decisions on the ground of the vice, inexpediency, and danger of such a measure, it is further shown to have no justification on the grounds of emergency or necessity, for there is open an easy, direct, and constitutional remedy for all the evils which are complained of as a basis for that measure.

The Federal Constitution provides (Art. IV, sec. 4):

The United States shall guarantee to every State in the Union a republican form of government.

It is obvious that the judicial recall measure could not apply in any particular state without express provisions for that purpose in the state constitution. So far as state application is concerned, it must first be adopted as part of the state supreme law, as a feature of state government. The federal Constitution contemplated a union of states having as their fundamental principles and laws of government only those which are and which should at all times remain essentially republican in form. And this provision of the Constitution was adopted to protect not merely against intrigues by foreign powers but also against the ambition and intrigues of local agitators. Its purpose was to keep uniform, within specified limits, the local state governments. As pointed out by Madison in the Federalist, explaining the purpose and force of this provision:

But who can say what experiments may be produced by the caprice of particular States, by the ambition of enterprising leaders, or by the intrigue and influence of foreign powers?

As long, therefore, as the existing republican forms are continued by the States they are guaranteed by the Federal Constitution.

The only restriction imposed on them is this, that they shall not exchange republican for antirepublican constitutions, a restriction which, it is presumed, will hardly be considered as a grievance.

It is not left, therefore, to the caprice of each state from time to time to determine whether it shall adopt features of government which are unrepblican or to repudiate entirely the republican form.

As pointed out also by Madison in the quotation of his observation upon the nature of a "pure democracy," above given, a yielding up to the direct vote of the people, as in pure democracy, is to be avoided as repugnant to our republican form of government, a government under which the people act through their respective or through representative departments, through whose carefully formulated deliberations and judgments, not the expressions of the temporary spasmodic will of the majority, but the deliberate, consistent, and logical judgment of the entire sovereign people, refined and corrected by careful study and consideration by individuals or tribunals adapted to that purpose, may be enforced, and that, too, consistently with the existing provisions of the fundamental supreme law as laid down in the Constitution. Not only is such representative element an essential feature of our republican form of government, but another and even more indispensable feature is the maintenance of untrammelled courts of justice presided over by judges who, during their terms of office, shall be independent, not only of the legislative and executive department, but independent of even the sovereign power of the people.

Recall of Judicial Decisions.

Ezra Ripley Thayer.

Among the evils which such judicial action brings in its train is suspicion of other decisions involving no such error and needless attacks on our constitutional system to secure ends attainable by means now at hand. These are to be expected

from ardent reformers distinguished for courage and acuteness rather than sanity or patience, whose lack of training in the law leaves them unaware of the flexibility and scope of our existing constitutional machinery.

The plan for the "recall of judicial decisions" has been much discussed and misunderstood. Its scope has not always been clear and may have been somewhat wider at the outset than afterwards. But in time, with Mr. Roosevelt's indorsement, it took the shape of a proposed amendment to the "due-process" clause of state constitutions, providing that under certain conditions a statute which the court has held to contravene this clause may nevertheless stand if approved by popular vote. In this form its novelty and injurious tendencies are not more conspicuous than its feebleness and inaptness. The power ostensibly given to the voters to do what the court regards as a deprivation of liberty or property without due process of law would be illusory; for the fourteenth amendment is expressly excluded from the project. And so, whether the "due-process" clause of the State constitution is amended in Mr. Roosevelt's way or in the ordinary way, or is repealed altogether, the unqualified prohibition against taking liberty or property without due process of law remains in force against both legislatures and voters just as before. And the fourteenth amendment gives the court the same power and duty as before to render the objectionable decision. The whole project is thus reduced to a roundabout attempt to obtain a review of the decision in Washington, preceded by a popular demonstration against the court.

These features of the proposal make its local and temporary character pretty plain. One of its ablest advocates has described it as "a good weapon with which to stay the proposed recall of judges." Another might see in it a club to brandish before a particular tribunal. Such ends it may serve for the moment, but its tendencies for the future make it an ugly weapon to use; and they are precisely the tendencies against which Mr. Thayer's argument is directed.

This may be brought out by supposing that the proposed clause permitting the rehabilitation of legislation by popular vote after an adverse decision of the court were attached to the fourteenth amendment, where it would mean something.

Logically and inevitably Mr. Roosevelt's proposal leads us to this, whatever may have been its original purpose. Or suppose the business of protecting life, liberty, and property be intrusted to the states as of old, the fourteenth amendment repealed, and the referendum provision added to the "due-process" clause in the state constitution.

The merit of this plan as against the present method of constitutional amendment is a question which should not be confused by clamor about matters beside the point—such as the injustice of allowing a writ of error to the Supreme Court of the United States when the law is sustained and denying it when the law is overthrown—or difficulties unduly clogging constitutional amendment in some states—or the supremacy of the popular will. The lack of a proper appeal to Washington is due to a defect in the judiciary act, which may be remedied by a mere amendment of that act. If the procedure for amending the constitution is too slow or cumbrous in any state, all that is needed is to make it less so. The machinery differs widely in different states, and the right amount of deliberation to require before a change is permitted would be just as real a question under Mr. Roosevelt's plan as it is now. And as to the popular will, it is plain enough that when constitutional limitations, whether rightly construed or wrongly, prevent wise legislation which the community demands those limitations must give way. The question is why this result should not be brought about by constitutional amendment in the regular way; and it is not hard to see that the demand for some other method is based on hostility to the very conception of judicial control over legislation.

Constitutional amendments in various forms will meet the difficulty. In the case of a workmen's compensation act, for example, such legislation, described in general terms, may be specifically authorized by an amendment to the "due process" clause. Or the disadvantage of such piecemeal amendment may be met, as Dean Ballantine has proposed, by a broader declaration that the legislature may declare any business public and subject it to any regulations which do not preclude a reasonable return on the investment. Or the "due process" clause may even be repealed altogether as to legislative action and the citizen left to such constitutional safeguards as remain.

Whichever be the form, no change is made in the system. The legislature still has absolute power within the range of permissible interpretation, and whether this limit has been overstepped is a question for the court.

Under the proposed system, on the contrary, the form of a constitutional limitation remains, but it is binding only to such an extent and in favor of such persons as the majority of voters may choose. The citizen thus has no rights which the legislature and the majority acting together are bound to respect.

Yale Law Journal. 22. 1-18. November, 1912.

Independence of the Judiciary the Safeguard of Free Institutions. William B. Hornblower.

I have hitherto spoken of judicial recall. What about the so-called "recall" of judicial decisions? This is a scheme lately devised by an ex-President of the United States. By the later interpretation placed upon it by its author it is narrowed down to a very limited class of cases. It is not every decision which is to be recalled by popular vote, but only special classes of decisions. Indeed, the decision itself is not to be revoked so far as concerns the individual litigants with regard to whom the decision was had; but the principle announced by the decision. The scheme as at present formulated by its author, as I understand it, is this: Whenever the highest court of a state shall have declared unconstitutional a particular statute of the state passed under the "police power" of the state for the supposed benefit of the health or welfare or safety of a portion of the community, and whenever such statute has been held by the highest court of the state to be unconstitutional because interfering with the life, liberty, and property clause of the constitution of the state, the people of the state shall have the right by a majority vote to set aside the decision of the court declaring the statute to be void and to restore the authority of the statute by plebiscite.

As thus restricted, the principle leaves unimpaired the power of the highest court of the land, a court, by the way,

composed entirely of judges not elected by the people at all, but appointed by the Executive with the consent of the Senate, and not removable by the people, but only removable by impeachment, and holding office for life or good behavior, to do the very things which the state courts are to be prohibited from doing, viz, to set aside absolutely and without any right of review a statute of a state passed under the police power of the state for the protection of the life, health, or safety of a portion of the community.

If it be said that a statute approved by the state court is hardly likely to be set aside by the United States Supreme Court, we can point to numerous cases where this has been done.

Thus, in the famous bakeshop case of *People v. Lochner* (177 N. Y., 145), the Court of Appeals of New York affirmed the constitutionality of a law limiting, the hours of labor of employees in bakeries and held it to be a valid exercise of the police power of the legislature relating to the public health. The decision was reversed by the Supreme Court of the United States (198 U. S., 45), which court held the act to be unconstitutional as an unreasonable interference with the liberty of the citizens.

The number of cases is legion where state statutes which have been upheld by the state courts have been set aside by the United States Supreme Court as violating the clause of the federal Constitution forbidding a state to pass any law impairing the obligation of a contract.

How long will it be before some future agitator, clamoring for the right of the people to rule, will insist that the decisions of the United States Supreme Court itself shall be made subject to review by popular vote? The federal courts have been in the past subjected to the fiercest attacks by political agitators and have been regarded with far more disfavor than the state courts. Only recently the decisions of the United States Supreme Court in applying the "rule of reason" to the Sherman antitrust act and in applying to that act a "reasonable construction" have aroused the anger of a large number of extremists.

The attack on the right of the courts to declare an act of the legislature or of Congress unconstitutional is but a

recrudescence of an attack which has been from time to time waged upon the courts ever since the foundation of our federal government. It has, indeed, been from time to time openly asserted and claimed that the courts have usurped a power not originally conferred upon them by the Constitution, state or federal, and not within the original intention or purview of the framers of the constitution. This proposition has even received support and encouragement from some of our best known writers on academic questions of constitutional law and even from professors in our law schools. It may not be unnecessary, therefore, to remind ourselves of the fallacy of this proposition.

So far as the federal constitution is concerned, the debates in the convention and the statements in the *Federalist* clearly show that the power and duty of the courts to declare an act of Congress or an act of the legislature void as unconstitutional was contemplated.

In the convention which framed the federal Constitution, it was proposed to create a "council of revision" to be composed of the Executive and a convenient number of the national judiciary, with authority to examine every act before it shall operate with a qualified veto power. This proposition, was, however, rejected.

In the course of the debate, the provision for making the judiciary a part of the council of revision was objected to on the ground among others that it would interfere with their freedom from bias when later called upon to expound the law.

On this point, Mr. Elbridge Gerry, of Massachusetts, said he doubted whether the judiciary "ought to form a part of it, as they will have a sufficient check against encroachments on their own department by their own exposition of laws, which involved a power of deciding on their constitutionality. In some states the judges had actually set aside laws as being against the Constitution. This was done, too, with general approbation." (*Madison's Journal of the Federal Convention* (Scott's Ed., Chicago, Albert Scott & Co., 1893), p. 101.) Mr. Gerry moved a proposition to give the veto power to the Executive alone. Mr. Rufus King, of Massachusetts, seconded the motion "observing that the

judges ought to be able to expound the law, as it should come before them, free from the bias of having participated in its formation." (*Ibid.*, pp. 101 and 102; *Farrand's Records of the Federal Convention*, Vol. I, pp. 97, 98.)

Mr. Wilson, of Pennsylvania, assumed that the judges as expositors of the laws would have power to refuse to give effect to laws clearly unconstitutional (*Ibid.*, p. 398).

Mr. Luther Martin, of Maryland, considered that the association of the judges with the Executive would be a dangerous innovation. "As to the constitutionality of laws, that point will come before the judges in their proper official character. In this character they have a negative on the laws. Join them with the Executive in the revision and they will have a double negative." (*Ibid.*, p. 402; *Farrand's Records of the Federal Convention*, Vol. II, p. 76.)

There were, it is true, some members of the convention who protested against conferring upon the judiciary the right to refuse to enforce unconstitutional statutes, but their protests only serve to emphasize the views of those who assumed that the judiciary would of necessity be called upon to pass upon the constitutionality of statutes, state and federal.

That the power and duty of the courts to pass upon the constitutionality of statutes was contemplated and intended by the framers of the federal Constitution is made plain by the statements of the Federalist.

In No. LXXVIII of the Federalist it is said:

The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution, I understand one which contains certain specified exceptions to the legislative authority, such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing. * * *

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. * * *

If, then, the courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty. This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill-humors which the arts of designing men or the influence of particular conjunctures sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency in the meantime to occasion dangerous innovations in the Government and serious oppressions of the minor party in the community.

Human language could not be more explicit than this. The Federalist was, as we all know, published as an appeal by Madison, Hamilton, and Jay to the American people for the adoption of the Constitution. That the adoption of the Constitution by the various states was due to the lucid and forcible exposition of its principles in the Federalist has been universally conceded. It follows that when the Constitution was adopted, it was adopted with explicit notification that the courts were intended to have the power to declare statutes unconstitutional.

I am quite at a loss to understand the state of mind of those who talk about "judicial usurpation" in passing upon the constitutionality of statutes. It would clearly have been judicial breach of duty if the courts had failed to exercise the function thus clearly imposed upon them.

Indeed, the duty of a court to refuse to enforce an act which violates a provision of the Constitution is perfectly obvious when we reflect upon the nature and objects of constitutional restrictions upon legislative authority.

As the matter was forcibly stated by Chief Justice Marshall in the great epoch-making case of *Marbury v. Madison* (1 Cranch's Repts., 137-180):

If two laws conflict with each other the courts must decide on the operation of each. So, if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the courts are to regard

the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution and not such ordinary act, must govern the case to which they both apply. Those, then, who controvert the principle that the Constitution is to be considered in court as a paramount law are reduced to the necessity of maintaining that courts must close their eyes on the Constitution and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our Government, is entirely void is, yet, in practice, completely obligatory. It would declare that, if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits and declaring that these limits may be passed at pleasure.

So unanswerable was the logic of the Chief Justice's opinion that, although it was really but an obiter dictum, the decision of the court being that they had no jurisdiction of the particular matter before them, being an application for an original writ of mandamus, not in aid of their appellate jurisdiction, the application for the writ being discharged, yet it became the foundation stone on which was built up the vast structure of constitutional jurisprudence, State and national, in this country. This structure has stood firm, from that day to this, notwithstanding the assaults of would-be innovators and the criticisms of academic theorists.

In George Ticknor Curtis's *Constitutional History of the United States* (Vol. I, p. 593) the subject is very forcibly put as follows:

To withhold from the citizen a right to be heard upon the question which in our jurisprudence is called the constitutionality of a law when that law is supposed to govern his rights or prescribe his duties would be as unjust as it would be to deprive him of the right to be heard upon the construction of the law, or upon any other legal question that arises in the cause. The citizen lives under the protection, and is subject to the requirements, of a written fundamental law. No department of the national, or of any state government, can lawfully act otherwise than according to the powers conferred or the restrictions imposed by that instrument. If a citizen believe himself to be aggrieved by some action of either government which he supposes to be in violation of the Constitution, and his complaint admit of judicial investigation, he must be heard upon that question, and it must be adjudicated, or there can be no administration of the laws worthy of the name of justice.

It is said by Mr. Justice Brewer in *Muller v. Oregon* (208 U. S., 420):

Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written Constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking.

The most serious aspect of the present agitation is not in its immediate results, but in the tendency towards ever increasing and rapidly accelerating demands for further changes in the direction of impairing the integrity and the independence of the judiciary.

It is said that the recall of judges if put into the constitution of a state will be seldom used, and the experience of Oregon is cited as an example.

The test will come, however, in time of great public excitement, when popular resentment is aroused against the enforcement of the law, affecting some class of the community.

Already threats have been made to invoke the recall in California to rebuke the judges for enforcing the law. What would have been the situation during the recent McNamara trial in California if judicial recall had been in force during that trial?

The McNamaras were on trial, it will be remembered, for dynamiting a newspaper office in Los Angeles, causing the death of several workmen. Intense feeling was aroused by the trial. Great numbers of men connected with labor unions insisted and most of them perhaps honestly believed the McNamaras to be innocent of the alleged crime and to be the victims of of an unjust and malignant persecution in the interest of the capitalistic classes. The McNamaras ultimately and before the close of the trial confessed their guilt and thus took the question of their guilt or innocence at once and forever out of the region of uncertainty.

No amount of testimony, however direct and positive, and however convincing to a jury, could possibly have made the guilt of the defendants absolutely clear to their sympathizers beyond all controversy, so long as the defendants had continued to protest their innocence. Suppose they had not confessed their guilt, but had been convicted and sentenced, can we doubt that there would have been public resentment and public clamor and that the judicial recall would have been promptly invoked to punish the judge who presided at the trial? Confession of guilt and that alone has vindicated the prosecutor and the judge.

"The appetite grows by what it feeds upon." It is appalling to think of the extremes to which popular majorities under the instigation of inflammatory harangues by eloquent or persuasive orators may be driven.

The right of the minority to be protected in their lives, liberty, and property from the clamor of temporary popular majorities is absolutely essential to the preservation of our free institutions.

"Half the wrong conclusions at which mankind arrives are reached by the abuse of metaphors," is a remark attributed to Lord Palmerston.

**Academy of Political Science (N. Y.). Proceedings.
3: 96-9. January, 1913.**

Recall of Judicial Decisions. Clarence D. Ashley.

If you find that a bill is incorrectly drawn there can be no quicker process than to have it redrawn and submitted the next year. There seems to be no sound objection to such a course. We must educate the draftsman of our bills, the thinkers among the public, and mainly our lawyers. That is why the present public discussions may be objectional. They detract our attention from the real points of danger. I believe that many of our rules of law are wrong. I think we are living under a system adapted in some respects to a civilization existing three hundred years ago. It seems to me that some sweeping changes might well be made. Thus we might abolish our rules of evidence, which are simply rules of exclusion. So, too, we could modify the subject of contract, and, for example, do away with what seems to be the unnecessary and harmful doctrine of consideration. I would change many other branches of our law. Thus we know that our criminal procedure is at fault and that there are many technicalities which allow rascals to escape. There is a vast amount of traditional reverence for what was quite proper for four or five hundred years ago, but is not so now. We know that many sound decisions shock common sense. Do not complain of these things, but get them changed by the legislature.

Our study should be mainly directed towards a solution of these difficult questions. Once bring our law in accord with modern civilization and many of our troubles will cease. Let us devote ourselves to a study of existing conditions, and determine how best we can educate our people and lawyers, so that these problems may be scientifically and carefully worked out.

SUPPLEMENTARY MATERIAL FOR SECOND EDITION

National Municipal Review. 3: 693-701. October, 1914.

Municipal Initiative, Referendum and Recall in Practice.

Charles F. Taylor.

To what extent have provisions for the initiative, referendum and recall been inserted in the charters of the American cities, and to what extent have they been used? These are natural questions; but the answers have never been worked out. Realizing this, I formulated a plan to get the facts. It is well known that since Des Moines combined the initiative, referendum and recall with the commission form of government in 1907, it has been "fashionable" to follow its excellent example. The philosophy is that it is unwise to give unlimited authority to a small body of men without reserving the possibility of final control in the hands of the voters.

As the municipal initiative, referendum and recall are found chiefly in commission-governed cities, for the reason above given, I used the commission-governed cities as the chief basis for my investigation. There are now 335 commission-governed and commission-managed cities in this country. I solicited the authorities of these cities to send me the facts concerning the existence of, and the use of, the initiative, referendum and recall in their respective cities. Some I had to solicit repeatedly. Finally I got the facts from 279 of said list, leaving fifty-six not heard from. It is fair to presume that there has been little, if any, activity in the use of these instruments in the comparatively few cities that failed to report.

Of the 279 municipalities reported, eighteen seem to be entirely without initiative, referendum or recall. Of the remaining 261 municipalities, 197 have all three; thirty six have the initiative and referendum; four have the referendum and recall; four have the initiative and recall; two have the initiative only; two have

the referendum only and fourteen have the recall only. However, six, not included in the above figures as having the referendum, have a limited referendum for franchises only or bonds only, one having the obligatory referendum on franchises.

In the home rule which went into effect in New York April 10, 1913, a referendum on franchises is granted to the cities of that state.

On June 30, 1914, the voters of St. Louis, Mo., adopted a new charter providing for the initiative, referendum and recall on a workable basis, the result giving St. Louis the distinction of being the largest city in the country having these instruments. Sentiment for them was increased by the successful use of the initiative under the old charter last March, in forcing the legislature to complete the Mississippi River bridge. At the time over 50 per cent of the voters signed the initiative petition.

The Michigan home rule of 1913 grants an interesting method of initiating charter amendments. In his "Organized Democracy," finished in May, 1913, Dr. Frederick A. Cleveland, on page 335 says: "In California eleven cities which do not have the commission form of government have adopted the initiative and referendum."

But the eleven cities in California referred to by Dr. Cleveland, and the home rule New York and Michigan cities, above mentioned, have not been included in the definite figures given in this article, owing to technical difficulties and the very recent enactment, precluding actual experience.

So much for the plain facts concerning the existence of these measures in the fundamental laws of the cities of this country. How about their use?

Of these two-sixty-one municipalities that have these powers, thirty-one have used the initiative, twenty-six used the referendum and twenty-seven have used the recall. Of the six that have the limited referendum, one has used it on franchises.

The preceding paragraphs contain some figures that will be a surprise to those who consider the initiative, referendum and recall as radical and dangerous instruments for the voter to possess. For example: of the 197 municipalities that possess all three of these instruments, 137 have not used any of them. This, however, does not argue that these instruments are not of value. Hon. Clinton Rogers Woodruff, the editor of the National Mu-

municipal Review, said in a lecture delivered at Raleigh, N. C., March 10, 1914, that these measures are "more valuable in their existence than in their use. Their existence impresses a sterner sense of duty and keener thoughts of responsibility in the minds of officials."

With the above explanation, I beg to submit the following summary of uses of these three instruments by the cities to date, according to the above mentioned reports:

Talladega, Ala. (April, 1911.) Several efforts made to use the recall, failed to get a sufficient number of signatures.

Oakland, Cal. (July, 1911.) Recall: August 5, 1912, "socialists and I. W. W. against mayor and two commissioners; defeated."

Vallejo, Cal. (July, 1911.) Petitions for the first recall are now being circulated.

Springfield, Ill. (January, 1911.) Recall: Attempt to recall commissioner Spaulding was made 1912; required number of signatures not obtained.

Marshalltown, Iowa. (Operating under state law.) One attempt has been made to recall the mayor; failed.

Cherryvale, Kans. (Operating under state law.) Recall, one attempt to recall mayor and finance commissioner, attempt covering April to September, 1913. First filing, names on petition insufficient; refiled, and names again insufficient; district court appealed to, and clerk's decision that names were insufficient was sustained. So the attempt at recall failed.

Pratt, Kans. Recall: September, 1913, unsuccessful attempt to recall the mayor.

Lawrence, Mass. (January, 1912.) Recall: School committeeman, J. J. Breen, was recalled at special election October 1, 1912.

Pontiac, Mich. (January, 1911.) Recall: "Attempt was made to recall the first mayor, R. J. Lounsbury, but did not materialize."

Nebraska City, Neb. Recall: "Our Chairman was recalled in November, 1913."

Long Branch, N. J. (April, 1913) Recall: "Petitions filed with city clerk and certiorari to supreme court."

Mandan, N. D. (Under state law.) Recall: One unsuccessful attempt.

Minot, N. D. (January, 1909.) Recall: October 18, 1913, "socialists invoked recall of mayor and one commissioner; but they were re-elected, and one socialist commissioner was recalled."

Bartlesville, Okla. (August, 1910.) Recall September 14, 1911. Attempt to recall mayor and two city commissioners. Failed on account of insufficiency of petition.

Duncan, Okla. (June, 1910.) Recall: Attempt to recall mayor in 1912; failed ("vote about 3 to 1 in his favor.")

Guthrie, Okla. (May, 1911.) Recall: "Twice petitions have been filed for recall of commissioners, but always insufficient." Mayor J. E. Nissley says: "All of above are dangerous weapons for local politicians."

McAlester, Okla. (July, 1910.) Mayor recalled. Date not given.

Muskogee, Okla. Recall: "June, 1913, an attempt was made to recall the mayor and two commissioners, but attempt failed absolutely."

Oklahoma City, Okla. (March, 1911.) Recall: "Been tried twice but requisite petitions never obtained. Is on again now for recall of mayor."

Portland, Ore. (1903.) Recall: June 5, 1911. Councilman; successful.

Aberdeen, S. D. (Organized under state law.) Recall: "Recall of commissioner. Defeated at election September 26, 1911."

Huron, S. D. Recall attempted. Date not given. "The commission sustained by a large majority."

Id., S. D. (Commission form adopted 1910.) Recall: February 1913. General recall of all commissioners by "wide open town" supporters. All commissioners re-elected.

Sioux Falls, S. D. (July, 1911.) Recall: September 24, 1912. Street commissioner; recalled. August 12, 1913. Water and sewer commissioner; defeated.

Dallas, Texas. (April, 1907.) It will be seen that Dallas has been quite enterprising in the use of the "democratic trinity," as the following report shows:

Recall: Election August 11, 1910. Petition filed to recall John W. George and John C. Mann, members board of education, as candidates to succeed themselves as members board of education, as above, John W. George received 1,662 votes; John C. Mann received 1,666 votes. As candidates to succeed George and Mann under recall petition J. D. Carter received 2,112 votes and J. B. McCraw received 2,107 votes. George and Mann were consequently recalled as members of the board of education.

Recall Election April 4, 1911. Petition filed to recall C. C. Lane, president board education; C. C. Lane, candidate to succeed himself, received 4,814 votes; E. A. Belsterling, candidate to succeed C. C. Lane received 5,435 votes.

Petition filed to recall L. R. Wright, H. D. Ardrey, Shearon Bonner as members, board of education. As candidates to succeed themselves under recall petition as above, as members board of education, L. R. Wright received 5,012 votes; H. D. Ardrey received 4,974 votes; Shearon Bonner received 4,934 votes. As candidates to succeed Wright, Ardrey and Bonner as members, Frank Gilbert received 5,334 votes; M. A. Turner received 5,301 votes; W. A. Goode received 5,286 votes. L. R. Wright, H. D. Ardrey and Shearon Bonner were recalled as members of the board of education. Frank Gilbert, M. A. Turner and W. A. Goode elected members board of education to succeed Wright, Ardrey and Bonner, recalled.

Petition filed to recall J. D. Carter and J. B. McCraw as members board of education. Under recall petition, as candidates to succeed themselves as above J. D. Carter received 5,304 votes; J. B. McCraw received 5,238. As candidates to succeed Carter and McCraw, George M. Stewart received 4,980 votes and John W. Pope received 4,923. Carter and McCraw were elected to succeed themselves as members of the board.

Austin, Tex. (March, 1909.) Recall: One unsuccessful attempt.

Hoquiam, Wash. (August, 1911.) Recall: April 24, 1912. "Recall petition charging Mayor Ferguson with incompetency, signed by 866 persons, filed with city clerk. May 22, 1912, primary election was held. Smith 265 votes, Knoell 1,180. On June 3, 1912, general election. Ferguson recalled by following vote: Knoell, 1,360, Ferguson, 870."

Tacoma, Wash. (October, 1909.) Recall: "In 1911, an attempt was made to recall the entire commission. The mayor and two commissioners were recalled, and two retained their seats. An attempt was made to get up a recall on the mayor in 1912, but it was dropped. An attempt is now (May 5, 1914) being made to get up a recall on two commissioners."

Walla Walla, Wash. (September, 1911.) Recall: One attempt summer of 1913; unsuccessful, as petition was insufficient.

Janeville, Wis. (April, 1912.) Recall: July 22, 1913. Attempt to recall the mayor "for enforcing laws and ordinances"; mayor sustained.

Superior, Wis. Recall: "Petitions have been circulated three times in twelve months; April, 1913, July, 1913, at it now. Never have been able to get the necessary signatures. Alleged reasons, failure to close red light district."

The recall was first used in Los Angeles, Cal., and has been used prominently in Seattle, Wash.

Buffalo is to vote in November on a new commission charter

providing for the referendum. Toledo in November, will on a charter providing for the recall of the mayor. The e of Louisiana, this year has taken the step of authorizing shes to adopt a three-commissioner form of government in the initiative, referendum and recall are provided.

We see in this review a safe, healthy and commendable exercise of direct powers of the voters in the public affairs of municipalities. These powers have not been abused, as is plainly seen by the large number of municipalities which have these powers, but which have never used them; and in the fact that in no place has their use been "cranky" or excessive. These powers have been used rather freely in Portland, Oregon, and in Dallas, Texas, but we have no evidence that there is any sentiment in these places for the abolition of these powers on account of their somewhat free use. On the contrary, we may reasonably assume that the use of these powers is an evidence of their appreciation—when there is occasion for their use.

If these powers of public control of public affairs and of officers had come sooner into the municipal life of this nation, would municipal mismanagement and corruption have become a national disgrace? I think not. I hope for and predict the continued rapid extension of the initiative, referendum and recall until they will be in the charter of every municipality under the stars and stripes. The modern American spirit demands that the public, through the electorate, shall have power to control public affairs and officers, whenever, in the judgment of the electorate, there is occasion to do so.

The People's Law. pp. 19-26.

William Jennings Bryan.

The attacks which were formerly made upon the initiative and referendum have been directed more recently against what is known as the recall. But it will be found upon examination that the recall is an evolution rather than a revolution. The right to terminate an official term before its legal expiration has always been recognized. I know of no public official who is not subject to impeachment at the hands of some tribunal. The only difference between the recall, as now proposed, and impeachment, as it has been employed, is that in impeachments the trial is before a body of officials, while the recall places the decision in the hands of the people. It is simply a question, therefore, whether public

servants shall be tryable only before public servants or by the sovereign voters who are the masters. If impeachment had been found entirely satisfactory, recall would not now be under discussion, but impeachment has proved unsatisfactory for two reasons. It is difficult to get officials to impeach an official; whether from fear that they will establish a precedent and endanger their own tenure of office, or whether for some other reason, may be a matter of opinion, but it is undeniably true that the present method of impeachment does not meet the requirements of to-day. Even the President of the United States, in a recent speech condemning the recall, admitted that the process of removal by impeachment must be improved upon.

A distinction should be drawn between the principle involved in the recall and the details of the measure applying the principle. There is room for a wide difference of opinion in the matter of detail and I am not inclined to be tenacious as to any particular detail, provided, the principle is clearly recognized and fully applied.

In acting upon definite propositions the people are less liable to be mistaken than in acting upon persons. They are also less likely to be swayed by prejudice or stirred by emotion. It is not unreasonable, therefore, to require a larger percentage of the voters to a petition for a recall than in the case of the initiative or referendum. I submit, too, that it may be wise to separate the question of the recall from the candidacy of the other person. When the voter is called upon to decide upon the merits of the recall and asked to choose, at the same time, between the incumbent and a person against him, there is more danger of confusion of thought. A nearer approach to justice may be found in having the question of recall settled by itself and the selection of a new official determined subsequently when the relative popularity of the individuals will not draw attention away from the single question whether the incumbent has failed to discharge satisfactorily the duties of the office.

Some have suggested that, to prevent the recall of an official on purely partisan grounds, the petition ought to contain the names of enough of those who voted for him to indicate the withdrawal of confidence—the petitioner's action at the first election being revealed by his oath where it can not be otherwise ascertained. This suggestion is worthy of consideration, and

to require this would enforce no hardship upon the petitioners. A still further limitation has been proposed, namely, that the petition should be left with some official where it could be signed by those wishing to sign it instead of being circulated by those who would solicit signers. This would not prevent the use of the recall in an emergency, but if such a provision is inserted in the law the percentage should be made lower than in the case of a circulated petition.

In discussing the recall I have assumed that it would apply without discrimination to all officials, including the judiciary. The argument that a judge should be exempt from the operation of the recall, even when it is applied to other officials, has no sound foundation. If it is insisted that he enjoys public confidence to a greater extent than other public officials, this very argument answers itself because that superior confidence will protect the judge against injustice. In proportion as people have confidence in the bench they will be less likely to remove a judge on insufficient grounds. If a judge is wrongfully removed—after the people have been given an opportunity to investigate the charge made against him and after passion and excitement have had time to subside—if under these conditions the people still do injustice to a judge, society can better afford to risk such occasional injustice than to put the judge beyond the reach of the people. If a judge is unjustly removed the people will make amends for it when they discover their error, and the vindication that the judge will receive when the error is corrected will more than compensate him for any mortification that he may suffer in the meantime. It is not necessary to reply to the argument that the recall will make cowards of judges; the judge who would be swerved from his duty by fear of a recall would not be fit for the place. Possibly, the recall may serve as a sifting process with which to eliminate those unworthy to wear the ermine. In fact, it would more than justify itself if it removed from the list of aspirants all lawyers who lack the courage to do their duty regardless of consequences. If there is any position in which we need rigid, uncompromising uprightness, it is upon the bench, and the recall, instead of menacing the independence of the judiciary, is more likely to improve the character of those who occupy judicial positions.

With the recall, official terms may with safety be made longer.

North American Review. 198:145-60. August, 1913.

Direct Rule of the People. George Kennan.

My object, however, in this paper, is to examine some of the methods by which it is proposed to improve the Government, and thus, presumably, make everybody contented and happy. Three of these methods, which have already been put in practice in many of our states, are known as the initiative, the referendum, and the recall. These measures are properly described as "progressive"; but, from a historical point of view, they should be called "reactionary," because they are a return to much earlier and more primitive methods. In the republics of Greece, in the free Russian cities of Novgorod and Pskof, and in most of the primitive communities whose records have come down to us, the people always legislated directly—generally by means of conventions or mass-meetings. Representative government, that is, legislation through delegates chosen by the people to act for them, is a much later invention. It is now proposed to abandon, in part, the new method, and go back to the old. The people, when they feel like it, are to make laws for themselves, just as they did in mediæval Russia and ancient Greece. They are also to have the right to discharge summarily, without impeachment or trial, all of their elected officials, including even their representatives and the judges of their courts. This may be improvement, but it certainly is not progress in the sense of going forward to something new. They had the initiative and the recall in Novgorod the Great—the first Russian Republic—nearly eight hundred years ago; and there the people had power to recall even the Prince whom they had elected to serve as President. They had the initiative and the recall fourteen hundred years ago, in Athens; and there they recalled, among others, such men as Thucydides, Alcibiades, and Pericles. These measures, therefore, are not new; they are centuries old, and they have been abandoned almost everywhere except in Switzerland. Within the past few years, they have been revived in Australasia, and in some of our western states, and there they are now being tried out again.

If we ask a Direct Ruler what he expects to accomplish by means of these measures, he will probably tell us that he expects to make the government more responsive to the wishes of the

people; to break up machine politics and the rule of the bosses; to improve legislation; and, finally, in the words of Mr. Roosevelt, to bring about a "practical betterment of social and economic conditions throughout the land." No one, of course, will deny that these are praiseworthy objects; but it is extremely doubtful whether they can be attained by the methods proposed.

What is the chief defect in our existing machinery of government? If we ask a Direct Ruler this question, he will probably say that the government does not represent the people; that the bosses, the corporations, and the privileged classes have secured control of it, and are using it for their own benefit, regardless of the people's wishes and interests. But even if this be true, who is to blame for it? Is it due to a defect in our form of government, or is it the fault of the people themselves?

Any one who studies the figures of our recent elections must be convinced, I think, that if the people do not rule as fully and completely as they ought to rule, it is because they are too indolent, or too indifferent, to take the necessary trouble. In the primary elections in the State of New York last fall, only fifteen per cent of the voters went to the polls. In Tioga County there were four thousand two hundred and forty-four voters; but only five hundred and sixty-one of them took the trouble to vote. In the village of Cortland there were one thousand three hundred and forty-two voters and only one hundred and ninety-seven of them voted. Only ten per cent of the voters went to the polls in Little Falls; only eight per cent in Watertown; and only six per cent in Ilion. How can people expect to rule, or to get good government, when five-sixths of them are so lethargic, or so indifferent, that they will not even go to the polls? The government falls into the hands of the bosses and the machine politicians simply because the people do not do their duty. It may be said that the primary elections, at which only nominations are made, are not important. But they are important. The people cannot expect to have good officials, or good government, unless they make good nominations.

The people, moreover, do not attend properly to their civic duties, even in matters of the utmost importance. In September, 1912, a general election was held in Ohio to vote on thirty-four radical amendments to the State constitution. Most of them were important, and one of them changed the constitutional law

of the State with regard to the sale of intoxicating liquor. Less than one-half of the enrolled voters went to the polls, and the number who voted on the liquor-law amendment was only one-third of the total enrollment. The best imaginable form of self-government must necessarily be a failure when, in a great state like Ohio, five or six hundred thousand voters out of a million either decline to vote, or stay away from the polls altogether.

One of the principal reasons for the failure of American citizens to vote is indifference. They are not generally interested in public questions that do not directly concern them. In the words of General Bingham, "The average citizen doesn't care until it hits him in his pockets, or in his home—hits him personally." President Taft may have made mistakes as Chief Executive of the nation; but he made no mistake when, four days before the recent election, he said to the students of Harvard, "The real solution of all our political difficulties is to be found in the stimulation of good citizenship. No machinery of any sort, whether by direct primary, referendum, initiative, or recall, will accomplish any real reform, unless the individual citizen himself is stirred to a better performance of his duty as a voter and as a member of his party. If the individual citizen improves his citizenship, then reform will follow, whether new machinery be adopted or not; and if the average standard of good citizenship is not improved, then new political machinery will not aid."

Many clear-sighted students of public affairs have expressed a similar opinion. In a recent address, Raymond B. Fosdick, former Commissioner of Accounts of New York, said that the great remedy for the evils that exist in New York is "personal and individual regeneration. There is no such thing as a civic 'presto change.' Permanent improvement in the quality of the government is dependent upon the quality of the people."

In a speech on the 28th of October last, President Creelman, of the Municipal Civil Service Commission, said: "We cannot carry on government by civil service commission. We must have an intelligent citizenship behind us. . . . What preparation does the voter, who selects the officers that make the policy of the government, make for the high function that he exercises?"

In a sermon preached in the Baltimore Cathedral, on the eve of the recent Presidential election, Cardinal Gibbons said: "It is my profound conviction that if ever the Republic is doomed

to decay. if the future historian shall ever record the decline and fall of the American Republic; its downfall will be due, not to a hostile invasion, but to the indifference, lethargy, and apostasy of her own sons."

And yet, this indifference of the citizen, which vitally affects the interests, if it does not threaten the very existence, of the Republic, receives no attention whatever in the platform of any political party. All the platforms refer to the rights of the people, but not one to their *duties*. James Bryce, a clear-sighted and sympathetic student of American institutions, has pointed out, in the following words, one of the reasons for this general neglect of civic duty. "The enormous growth of modern states has made the share of the individual citizen seem infinitesimally small. In an average Greek republic, he was one of from two to ten thousand voters. In England or France to-day he is one of many millions. The chance that his vote will make any difference to the result is so slender that it seems negligible."

The Direct Rulers assert that our government is bad because the people do not control it; but the people do not make use of the remedies for existing evils that they already have. What good reason is there to suppose that they will continuously, persistently, and indefatigably make use of the new remedies that are now suggested? So long as such remedies are novel, and so long as the moral and civic enthusiasm that is characteristic of the present time lasts, universal primaries, the initiative, the referendum, the recall, and the various other panaceas that are proposed, will perhaps work well; but when this reform wave passes, when the people get tired, or perhaps disillusioned, and when they begin to neglect their civic duties again, the new machinery will grind out crooked bosses and crooked business just as the old machinery did. The evil-doers are always alert and active, because they live by it. They watch the representative machine constantly and, so far as possible, direct and control it. The people, on the other hand, are at one time in a fever of moral reform, and at another time in a chill of civic indifference. They supervise and direct the political machinery for a while, but then they neglect it and the bosses get control. The people—or at least the Progressive people—seem to think now that if they secure universal primaries, the initiative, the referendum, and the recall, good government will come almost automatically; but it

will not. The evil-doers will use the new agencies, if the people neglect them, just as they used the old. Mr. J. B. McClure, not long ago declared that "a successful government must be neglect-proof;" but there is no possibility of making a government neglect-proof. Every human agency must have intelligent and incessant human control, and a neglect-proof government is no more practicable than a neglect-proof steam-engine, or a neglect-proof aeroplane. The price of good government is eternal vigilance, and for eternal vigilance the people of the United States have never yet shown the slightest capacity.

Supporters of the initiative, the referendum, and the recall say that these measures will take the government out of the hands of corrupt or selfish bosses, and put it in the hands of the people where it properly belongs. But will this be the result? It seems to be more than doubtful. The bosses as well as the people can initiate bills and make recalls, and they are far more shrewd and resourceful than the people are in the art of political manipulation. The new machinery, moreover, affords as many opportunities for fraud as the old did. What is to prevent the bosses or the "interests" from initiating bills, hiring corrupt canvassers, and getting thousands of fictitious or fraudulent signatures to their petitions? In Oregon they have already done this. In a judicial investigation of the "spite" referendum on the appropriation for the state university, ten thousand out of thirteen thousand signatures were found to be fictitious or fraudulent.

In the city of Seattle, last fall, there was an anti-vice crusade, headed by the mayor and aided by a body of special police known as the "Purity Squad." The vicious interests of the city, very naturally, did not like it, and began a popular proceeding to remove the mayor by means of the recall. They offered a recall petition bearing the signatures of twenty-six thousand six hundred alleged citizens, but, upon investigation, all but about eight thousand of the signatures were found to be fraudulent. Meanwhile, a force of seventy-five clerks had spent two weeks in the work of verification.

No one has set forth more clearly the fundamental defects of direct popular rule than has the distinguished author of "The American Commonwealth. In a recently published volume entitled "Hindrances to Good Citizenship," Mr. Bryce says:

The deficient sense of civic duty, though most frequently noted

in the form of a neglect to vote, is really more general and serious in the neglect to think. Were it possible to have statistics to show what percentage of those who vote reflect upon the vote they have to give, there would in no country be found a larger percentage. Yet what is the worth of a vote except as the expression of a considered opinion? The citizen owes it to the community to inform himself about the questions submitted to his decision, and to weigh the arguments on each side; or, if the issue be rather one of persons than of policies, to learn all he can regarding the merits of the candidates offered to his choice. But intelligence and independence of thought have not grown in proportion to the diffusion of knowledge. The number of persons who both read and vote, in England and in France, is twenty times as great as it was seventy years ago. The percentage of those who reflect before they vote has not kept pace either with popular education or with the extension of the suffrage. The persons who constitute that percentage are, and for the reasons already given must for some time continue to be, only a fraction—in some countries only a small fraction—of the voting populations.

The reason why the average voter so often neglects his duty to think and vote is stated by Mr. Bryce as follows:

A duty shared with many others seems less of a personal duty. If a hundred, a thousand, or ten thousand other citizens are as much bound to speak, vote, or act, as each one of us is, the sense of obligation becomes to each one of us weak. Still weaker does it become when one perceives the neglect of others to do their duty. The need for the good citizen's action, no doubt, then becomes all the greater. But it is only the best sort of citizen that feels it to be greater. The Average Man judges himself by the average standard, and does not see why he should take more trouble than his neighbors. Thus we arrive at the result summed up in the terrible dictum: "What is Everybody's business is Nobody's business." . . . The theory of universal suffrage assumes that the American Citizen is an active, instructed, intelligent ruler of his country. The facts contradict this assumption.

**Dilemma of the Judicial-Recall Advocate: Address Before
the Missouri State Bar Association, St. Louis, Mo.,**

September 23, 1914.

Rome G. Brown.

There are, throughout the nation, significant evidences of increasing enlightenment upon the question of judicial recall. While the average voter has as yet insufficient appreciation of its baneful character, nevertheless there is a perceptible change in sentiment showing itself among the people of the different States. Former leading advocates of the judicial recall are saying less about it. Some of them are now saying nothing about it. Many have retreated to a position less repugnant to the constitutional government. For instance, there had been most persistent advocacy of the judicial recall in Ohio. The president of the recent Ohio constitutional convention and many

influential members of that convention, who are not learned in the law, were, and still are, advocates of the recall of judges and of judicial decisions. Yet that constitutional convention refused to refer to the electors of Ohio the proposition of judicial recall. Instead that convention proposed a State constitutional amendment, which was adopted by the people, providing that no act of the legislature, duly approved by the executive and not vetoed by the people through the use of the referendum, shall be declared unconstitutional by the State supreme court unless six of the seven judges concur. So in the constitutional amendment proposed for adoption at the general election this fall in Minnesota, increasing the number of supreme court judges from five to seven, it is required that a concurrence of five out of seven judges shall be necessary in order for that court to declare a statute unconstitutional. Colorado participates in the same plan. This has become known as the "Ohio plan."

In Colorado, however, a further amendment forbids the judges of certain courts from declaring a statute or ordinance unconstitutional on the ground that it contravenes the Federal Constitution. The jurisdiction and function of a State court, so far as observing the requirements of the Federal Constitution is concerned, are, however, fixed by that instrument, which makes it the sworn duty of every judge, Federal or State, to observe the provisions of that fundamental law as the supreme law of the land. This duty and function have been established, as an essential principle of our form of government, to include the power and obligation of every court, and of every judge of every court, to declare unconstitutional and unenforceable any statute, and any provision of any statute, which is repugnant to the prohibitions and limitations expressed in the Federal Constitution. Such duty and function, therefore, would seem to be not subject to abolishment or diminution by any legislative enactment or constitutional provision of a State. Accordingly, the Colorado extension of the Ohio plan is itself manifestly repugnant to the Federal Constitution, and, therefore, invalid. Depriving a mere majority of a state supreme court of the power to declare a statute invalid and unenforceable is less objectionable. Substitutes, such as the Ohio plan, for the drastic and subversive judicial recall measures have the merit that they are, at least, less repugnant to our system of government.

Indeed, as through the initiative and referendum the powers of State legislation become more and more under the direct arbitrary action of the electorate, it is necessary, for the proper protection of personal liberty and property rights, that the safeguards of the Federal Constitution should, more than ever, come within the direct jurisdiction of the Federal Supreme Court. Under the present Federal judiciary act that Federal jurisdiction, as applied to the review of judgments of State courts upon the constitutionality of State statutes, is limited to a review of the judgments of State courts wherein statutes are held valid. The American bar has long advocated the extension of that Federal jurisdiction also to decisions of State courts wherein a State statute is held invalid upon Federal grounds; but it seems difficult, and perhaps impossible, to get such extension through the Federal Congress. At the present time a majority of a State supreme court may generally declare a State statute invalid. The more difficult it is made for a State supreme court to invalidate a State statute, the more is the opportunity increased to have the constitutionality of a State statute adjudicated by the Federal Supreme Court. Where now usually a majority of a State supreme court may invalidate a State statute upon Federal grounds, the final judgment of the highest court of that State as to the constitutionality of such statute must, under the Ohio plan, be in favor of its validity unless more than a majority of the State court are against it. This would increase the number of cases where a writ of error would lie to the State court upon an adjudication of a constitutional question. I am not advocating the Ohio plan, but simply suggesting that, for existing insufficiencies which are recognized by the bar generally, it offers some elements of remedy consistent with our form of government. In that respect it differs from the judicial recall, which is lacking in remedial character and is subversive of our form of government.

The Dilemma of the Advocate of Judicial Recall

An interesting and encouraging phase of the judicial recall controversy has merged in the form of a dilemma with which the recall advocate is, under present conditions, squarely confronted. The widespread opposition arguments to the judicial recall have brought a wholesome enlightenment to thinking citizens. Its

representative advocates have generally been superficial theorists, to whom an intelligent comprehension of our system of government is impossible. Some have been conscientious, but sadly lacking in those foundations of knowledge for which a proper grasp of the subject is necessary. Some have been reckless agitators, disciples of unrest, who, not from lack of intelligence, but from lack of proper regard for our free institutions, have been willing to exploit themselves as advocates of a drastic and suicidal specific for existing evils in the administration of government. The demagogue is always with us. Men, including some who were once sane leaders of thought and of action, have been willing to feed the fires of revolution by catering, not to the intelligence, but to the lack of intelligence, of those who would pretend to believe that our Government is an organized system of oppression. Then there is the socialist doctrinaire, whose propaganda of enmity to our Constitution and the Government established under it has been spread broadcast through pamphlets, the socialist press, and by the street-corner orator. The methods of the advocacy of judicial recall by these agitators have been marked by a wholesale denunciation of the judiciary and of the judicial function under our system of government, the stability of which depends upon the maintenance of the integrity and independence of its judicial departments. This propaganda of disruption has also been furthered by the professional or chronic muckraker, appearing in the form of a contributor to or editor of some magazine of wide circulation, or in the form of some political or judicial pervert who allows himself to become the instrument of socialist teachings.

It was formerly sufficient that the judicial recall shouter should detail both real and imaginary evils in the administration of law as the source of all social injustice, and without analysis and without disclosure of its real significance, should then urge as a panacea the assertion by the citizenship of the nation of the right arbitrarily to recall a judge, or of the right at a mass meeting of the voters or through a referendum ballot and in violence of the judicial function directly and arbitrarily to adjudicate the constitutionality of a statute. Voters were thus at first misled by the impression that by the removal of limitations upon the arbitrary power of the electorate we would have

a government which was nearer to a pure democracy, and that in so far as our democracy limited the powers of the people it was the means of oppression. Thus through hue and cry the fallacies of the judicial recall gained a strong hold upon the minds of the voters in many States.

But, in the meantime, a campaign of education has been continued by the opponents of judicial recall. Through their efforts people are recognizing more and more the fact that rules of conduct are necessary in governmental affairs as well as rules of conduct in regard to ethical duties between man and man; that for the protection of the individual and of minorities against the oppression of the whim and caprice of local and temporary majorities, it is necessary that the legislative power of the majority be limited, and that in no other way can the personal liberty and the rights of property and the pursuit of happiness be vouchsafed to the citizens of a constitutional democracy. The fact is further becoming recognized by the citizen voter that rules of conduct in governmental affairs are meaningless without some established power of their enforcement, and that such assurance can only rest in the maintenance of an independent judiciary, to whom shall belong the function of setting aside any arbitrary legislation of a majority which deprives the individual or the minority of the rights which are thus safeguarded. The attack upon the established judicial function which is made by the judicial recall, has been discovered to the people as an attack upon their rights and liberties, because it is an attack upon the safeguards established for their protection.

To-day the judicial recall advocate has to face the proposition, to which he is now forced by the increasing enlightenment of his audiences, that he must either recede from his advocacy of judicial recall or must take the position of one who is avowedly an opponent of our present form of Government. He is, therefore, relegated to the position of the socialist agitator just as long as he persists in his advocacy of the judicial recall. Placed in that dilemma, many of its former advocates have shrunk before the alternative thus forced upon them and have given up the subversive proposition of the judicial recall and have become identified with measures less revolutionary. Some have become advocates of the "Ohio plan," requiring more

than a majority decision of a court to declare a statute unconstitutional.

One of the salutary effects of this agitation has been to strengthen the cause for which the American bar has been for years working—the cause of remedial reforms in the administration of justice. That cause has advanced in the past few years with rapid strides, as shown by the adoption of various statutes and rules of procedure eliminative of former obstacles to the efficient enforcement of the law. Organized efforts for further reforms, which promise effective results, are shown by the investigations and the reports which are now in progress on the part of the National and State bar associations and on the part of associations not controlled by lawyers. The National Economic League, through its committee of 200 selected from all parts of the country and composed of the most distinguished lawyers and laymen, has, through its preliminary report just published, outlined a systematic movement for thorough reforms corrective of present evils and promotive of the best efficiency in the administration of justice.

The Judicial Recall not Remedial, but Subversive

The recall of judges has the effect to subject judges to the constant menace of the arbitrary will of the voters of the judicial district in which they preside. It leaves to a mass meeting of voters, controlled by a majority of those who happen to be present, the arbitrary power to unseat a judge. The exercise of the recall in Oregon has shown that, despite the pretention to the allowance of a defense and hearing, the decision of the voters is controlled by hue and cry and that the system is merely a return to the ostracism of ancient democratic tyrannies. Its effect is only to lessen, to the point of destruction, whatever of independence is left to the judge by the judicial elective system. It invites, even compels, a judge to keep his ear to the ground and to anticipate the changing whims of popular passion. He is made a servant, not of the law, but a mere spokesman of the caprice of majorities. The system, therefore, is one which tends to eliminate the protective force of constitutional safeguards.

The judicial decision recall is more directly subversive of our system of government. Its effect is to vest in the makers of a statute the power to dictate as to its enforcement, irrespec-

tive of the question whether or not it deprives any citizen or any set of citizens of their liberty or property without due process of law. Indeed, the enforcement of such a statute, under the decision recall, is not left to its legislative authors, who may be supposed to have given to it some method of deliberation; its enforcement is left to a mass meeting of the electors of such legislature.

American Political Science Review. 8: 632-3. November, 1914.

Recall of Judicial Decisions.

The first state to adopt the recall of judicial decisions as a part of its judicial practice is Colorado. The constitutional amendment providing for such recall was adopted at the November election in 1912, and went into force in January, 1913. The provisions first prohibit all courts except the supreme court from passing upon the constitutionality of any law or city charter or amendment adopted by the people in a city, and then go on to say that any decision declaring or adjudicating that any law of the State or any city charter or amendment adopted by the people in a city is in violation of the constitution, shall be subject to approval or disapproval by the people of the State if a state law, or by the people of the city if it be a city charter or amendment.

Decisions on state laws and city charters under the terms of the act do not become binding for sixty days after they are filed in the office of the clerk of the supreme court, and if five per cent of the qualified electors request that such law be submitted to the people, the secretary of state must publish the text of the law and submit the same to the people at a general election if held within ninety days. The legislature may also provide for submitting such laws or charters at a special election. If a majority approve the act it becomes binding as a law of the State regardless of the decision of the supreme court.

The same provisions respecting the submission of city charters to the people of the city is made. Such petition must be filed with the legislative body of the city which must then publish the text and submit the act to the people at a special election, unless a regular election is to be held within sixty days. The constitution specifically sets forth the method of securing the petition by providing that petitions may be circulated in sections

and that persons securing signers of any part of the petition shall make oath as to its genuineness. Provision is made for protest and hearing against the genuineness of signatures or the legality of other acts and the sufficiency of the petition. When any petition contains a form of submission containing a reasonably fair description of the act or charter to be referred, no petition filed subsequently thereto shall be permitted to use any form of submission that is so similar to the one previously filed as to tend to confuse the voter.

Nation. 97: 526. December 4, 1913.

Recall of the Ives Decision.

Figures of the vote at the last election in New York State on the constitutional amendments have been coming in very slowly, but they have no room to doubt that Amendment Number Two has been ratified by a heavy majority. This result was a foregone conclusion. There was virtually no opposition. The amendment removes all limitations which the New York Constitution might otherwise be construed to place upon the power of the Legislature to enact for the protection of the lives or safety of employees or for any desired system of workmen's compensation for injuries or death. Yet this highly important amendment was not only passed by two successive Legislatures, with very little difficulty, but went to the people with the explicit endorsement even of newspapers of the most extreme "capitalistic" type.

The decision of the Court of Appeals in the Ives case, pronouncing unconstitutional the workmen's compensation act drawn by the Wainwright Commission, was the occasion for this amendment of the State Constitution. In the opinion of some excellent lawyers, that decision was an instance of that extreme interpretation of Constitutional restraints which for a long time was prevalent among our courts, though it is now in a fair way to disappear altogether, and is in distinct contrast to the spirit shown for some years past by the Supreme Court of the United States. That Court has unanimously upheld an employers' liability act whose constitutionality had been disputed on essentially the same grounds as those asserted in the Ives case; and in a number of decisions concerning the scope of the police power it has laid down doctrines based upon liberal interpretation.

This Ives decision has furnished no end of capital to Mr. Roosevelt and his followers. They have pointed to it as showing the urgent need of his scheme for the recall, or reversal, of judicial decisions by popular vote. Now the object has been accomplished, not only with great ease, but with great promptness, while leaving the functions of the judiciary unimpaired; yet there is no telling but the Rooseveltians may regard this not as a disproof, but as a vindication, of their position. "It is true," they may say, "that you have found it easy to amend the Constitution, while we have been talking as though it were next to impossible; but wouldn't our way have been much better? Why not just set aside the objection to the particular law you want, instead of going to the length of amending the Constitution itself? If the Court was wrong in its interpretation, would it not be best simply to reject this in the specific instance, and let the future take care of itself?"

The plea is not without plausibility. But there is a fundamental and fatal objection to it. The process of popular appeal upon specific decisions cannot possibly be limited to cases in which the Court's interpretation of the Constitution is "wrong." It is bound to work out in practice as simply a vote on the disputed legislative measure; and, however sound and wise may have been the decision of the Court as a matter of Constitutional interpretation, the people would vote it down if they wished the measure enacted. Indeed, the Colonel, in his most recent statement of the recall-of-decisions project, drops the Constitutional element completely, the question to be put to the people being simply whether the law in controversy shall stand or not. It is a tenable position that we should be better off without any written Constitution; it is a tenable position that, even with a written Constitution, the judiciary should have no power to declare laws unconstitutional. But to have a written Constitution, and to give the courts the power to pass upon the validity of a law under it, and then to permit Constitution and judicial decision alike to be reduced to so much waste paper whenever a popular majority desires to have its way in spite of them, is palpable absurdity.

One feature of our judicial system which is clearly in need of alteration is pointed to in the situation arising out of the adoption of Amendment Number Two. The United States Constitution contains a provision essentially identical with that in the State

Constitution upon which the Ives decision was based. It is by no means inconceivable that if the validity of a compulsory workmen's compensation act, passed at Albany this winter, were to be challenged as a violation of the Constitution of the United States, the Court of Appeals might decide against the law. Probably it would not, since the Supreme Court's precedents would then be binding; but it is possible that the new law would involve some feature not covered by the precedents. Now, if the Court of Appeals were to decide against the law as violating the United States Constitution, an appeal to the Supreme Court of the United States ought to be possible. But it is not. Under the Federal statutes, such an appeal does lie from a decision upholding the law, but not from a decision invalidating it. This is an anomaly, though it is not difficult to see how it may naturally have arisen. But all that is required to remove it is the passing of an act of Congress. This ought to be done at a very early date. It would remove a real grievance. The matter has been brought forward from time to time, but has apparently been neglected out of sheer inertia. It would be a particularly happy stroke for Senator Root to advocate this reform and push it to speedy accomplishment.

Annals of the American Academy. 52: 25-36. March, 1914.

Constitutional Growth Through Recall of Decisions.

Donald R. Richberg.

Seldom has a political theory received so little unprejudiced consideration as the "recall of decisions." Bench and bar and the lay public have confused the idea with the recall of judges; have repeated catch phrases, such as—"the appeal from the umpire to the bleachers"; and largely overlooked the substance of the proposal—an improved method only, for the exercise of a fundamental power reserved to the people, to make, to amend, and to interpret their constitutions.

The lack of a clear understanding of the proposal, rather than any vicious intention to misrepresent, is responsible for many unfair arguments against it. Lawyers, who should be better informed, repeat the stale misstatements of their professional brethren; and laymen, who have acquired a wholesome distrust

of the advice of the bar, may be thereby unduly prejudiced in favor of the proposition.

It is possible that a presentation of the idea in words of one syllable may serve a double purpose in helping to clarify the real issue both for members of the bar and for the interested public. In order to simplify the exposition so far as possible, the present consideration will deal only with the recall of a limited class of "police power" decisions.

Why and When Necessary

In a certain class of important cases there may be, under the constitution of every state in the Union, a conflict of authority between the legislature and the courts.

Under the constitution the legislature of a state claims the power to pass a certain law—a law not prohibited by any definite words in the constitution.

Under the constitution the supreme court of the state claims the power to declare that particular law void.

Who is to decide between these two claims of power?

The court may decide the case before it, but the court cannot decide the conflict in opinion between itself and the legislature.

Controversy has arisen between two arms of government of equal authority. No one can be assured whether the will of the people has been thwarted or upheld. A prudent regard for maintaining respect for the law and retaining confidence in the institutions of government requires a final adjudication of the controversy, which shall assure the supremacy of the will of the majority, as speedily as is consistent with intelligent consideration.

Clearly the only power superior to both the courts and the legislature lies in the people who made the constitutions which give the two conflicting bodies their authority.

Clearly the people can only exercise their power directly through the ballot box.

The truth of these conclusions is not to be disputed by any student of constitutional law or political science.

Controversy arises only over the question: How shall the people exercise their power to determine what the law shall be, when their representatives in the legislature and on the bench disagree?

The established method has been by amendment of the constitution.

The proposal made by Theodore Roosevelt before the Ohio Constitutional Convention was that in a certain limited class of cases a better method would be the "recall of decisions." This he has more recently described as the "review by the people of judge-made laws."

Neither of these terms, each being a definition of procedure, quite describes the purpose of the popular vote, which is—the decision by the people of a controversy between their courts and their legislature.

The courts are the guardians of the people's fundamental law—the constitutions. The legislatures are the makers of the people's ever-changing law—the statutes. Both the preservation of the principles of the fundamental law and the right to develop those principles in the changing statutes are essential to our form of government. In harmony they express the will of democracy. In conflict the law of the land becomes confused and uncertain.

In order to measure fairly the value of the new method for popular decision of such conflicts, one must have in mind the merits and demerits of the old method which it is sought to improve.

Why Constitutional Amendment Is Inadequate

In the first place the point of the proposal can be kept most clearly in mind by considering only the application of the "recall of decisions" to cases where the extent of the police power is the decisive issue.

The Progressive national platform has limited this doctrine and expressed the party position in the following language:

That when an act, passed under the police power of the state, is held unconstitutional under the state constitution, by the courts, the people, after an ample interval for deliberation, shall have an opportunity to vote on the question whether they desire the act to become a law, notwithstanding such decision.

To understand the reason for this limitation one must know what the "police power" is—a subject quite vague in the minds of laymen and none too clearly understood by many lawyers.

What the Police Power Is

When a people write a constitution they create the machinery of government. They establish a legislature to make new laws

and to change old laws, in order to express the developing ideals of business and social morality. They designate and provide for the election of executives to administer these laws. Lastly they establish courts to decide controversies over private rights and over the powers and duties of public officers. A constitution gives certain powers to public servants and prohibits certain other powers and therefore contains both grants of authority and limitation of authority.

When the supreme court of a state upholds or denies the power of the legislature under the state constitution to pass a law, the decision will fall into one of two classes. It will be based on either:

- | | |
|---|------------------------------|
| (1) Definite power granted or denied
in specific words | } in the state constitution. |
| or | |
| (2) Broad power granted or denied
in general terms | |

The Present Consideration of the Recall of Decisions Deals Only with the Second Class of Cases

A few examples of the type of constitutional provisions involved in the first class may be taken from the Constitution of the United States:

- | | | |
|------------------------------|---|--|
| Power definitely granted. | { | The Congress shall have power |
| | | To lay and collect taxes. |
| | | To coin money. |
| | | To establish Post Offices and Post Roads. |
| Power definitely prohibited. | { | No bill of attainder or ex post facto law shall be passed. |
| | | Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. |
| | | |

When a legislature exercises such a power definitely granted or prohibited and the supreme court interprets such definite language, there is no conflict of authority. If there is difference of opinion, even the legislators themselves will yield to the greater wisdom of the court in interpreting constitutional or statutory language. Nor would the average citizen care to act as a court of appeal.

In such a case the supreme court explains and enforces the constitution. If the language of the constitution no longer represents the will of the people the appropriate action to be taken by the people is to amend the constitution by altering its language.

But an entirely different situation is presented when constitutional questions arise in that twilight zone between broad powers granted and broad powers denied, in general language.

The most shadowy realm of all is between two provisions here quoted from the national Constitution but found in substance in practically all state constitutions:

Power broadly granted.	{	The Congress shall have power To provide for the common defense and general welfare. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers.
Power broadly prohibited.	{	No person shall be deprived of life, liberty or property, without due process of law.

Between the above quoted granted power and prohibited power lies the great twilight zone of the "police power"—the power of the state to pass and enforce laws which are neither specifically authorized nor prohibited in the state constitution, but which are in aid of the general welfare.

If, for example, the state supreme court believes that a ten-hour law for women is necessary for the general welfare that law will be upheld as a proper exercise of the "police power."

If, however the state supreme court does not believe that such a law is necessary for the general welfare, the law will be held unconstitutional—as depriving women of "liberty" (the right to sell their labor for more than ten hours) without "due process of law."

The difference therefore between laws which are constitutional and unconstitutional, between what is "due process of law" and what is not, in such cases involving the "police power" does not depend upon any language in the constitution. These cases are decided solely upon the opinion of the court as to whether the law is necessary for the general welfare and hence authorized by the "police power."

As Mr. Justice Holmes of the United States supreme court has written, the extent of the "police power" depends upon "the prevailing morality or strong and preponderant opinion" of the time.¹ Therefore a conscientious court will endeavor to express the will of the majority in its opinion. An obstinate, narrow-minded court will deceive itself as to what the "prevailing mor-

¹ Noble State Bank vs. Haskell, 219 U. S. 104, 111.

ality" demands. But in either case the decision will be based upon the opinion of the court concerning what laws are required in aid of the general welfare. If the court holds the law "unconstitutional," there are two conflicting authorities—the legislature and the court—one holding the law necessary to the general welfare, and the other holding the law not necessary to the general welfare. And there will be not one word in the constitution requiring either body to make or to annul the law.

Under those conditions it is simply pettifogging to say that "the judges are forced to their decision by their oaths to support the constitution." The legislators who passed the law took the same oath. Neither the legislators nor the judges would violate their oaths by reversing their action.

When, however, the "conscientious opinion" of a court voices the individual conscience of the judge in opposition to the expressed conscience of the people the fulfillment of the oath to preserve the constitution may be seriously questioned.

As stated in the beginning, there is in these "police power" cases a conflict between two arms of government and only the people who made both can decide which is right. Furthermore—since the whole question at issue is: What is demanded by the prevailing morality?—how could the correct answer be more surely ascertained than by taking a well-considered vote on the question?

The established method since this republic was formed for obtaining this vote has been to submit an amendment to the constitution covering the question at issue. There are two strong reasons why this method is inadequate and unsatisfactory in dealing with "police power" cases.

1. Amendment of the constitution is a slow, cumbersome process; not adapted to the need for settlement of a conflict between authorities over what is "constitutional."

2. There is nothing in the constitution to be amended.

Taking these points up in order:

1. Amendment is a Cumbersome Process

Careful deliberation in amending the grant of a power or the prohibition of a power is the part of wisdom. The fundamental law should be as solid as the foundations of a building—only to be rebuilt with great labor and caution. But in disputes between

the courts and the legislature over the police power there is no fundamental question involved. The "police power" builds in the superstructure of government. The foundations remain unchanged, regardless of whether the court permits the legislative masons to put on another story or to remodel the interior.

Excessive deliberation is exasperating to a people determined to right industrial and social wrongs. If the court's opinion of the prevailing morality is correct, the sooner it is sustained the better. If the court's opinion is incorrect, the sooner it is reversed, the sooner will popular antagonism to the court subside—and respect for the law be restored. Of course a reasonable period of consideration is necessary in order that the popular verdict may express a conviction and not a transient emotion.

2. Amendment Is an Inappropriate Process

The strongest reason for a popular referendum on a "police power" decision is that there is nothing in the constitution to amend. There is no language to be altered, no new principle to be established. The legislature has the right to enact laws to promote the general welfare. The legislature has no right to take life, liberty or property without "due process of law." So it is and so it shall be. There is nothing for the people to amend in either the grant or the prohibition of power. It is also highly desirable that these two broad principles should not be qualified by a mass of formal exceptions.

The legislature and the courts have disagreed as to whether one particular law is necessary for the general welfare—is demanded by the "prevailing morality."

The people do not wish to change their constitution if they disagree with the supreme court. They simply wish to furnish conclusive evidence to the court of what the constitution as it is written authorizes, when interpreted in the light of the "strong and preponderant opinion" of the present generation.

Chief Justice Winslow of the supreme court of Wisconsin has written well and forcibly:²

When an eighteenth century constitution forms the charter of liberty of a twentieth century government must its general provisions be construed and interpreted by an eighteenth century mind surrounded by eighteenth century conditions and ideals? Clearly not. This were to command the race to halt in its progress, to stretch the state upon a veritable bed of Procrustes.

² *Borgnis vs. Falk Company*, 147 Wis. 327. 1911

Where there is no express command or prohibition, but general language and policy to be considered, the conditions prevailing at the time of its adoption must have their due weight, but the changed social, economic and governmental conditions and ideals of the time, as well as the problems which the changes have produced, must also logically enter into the consideration, and become influential factors in the settlement of problems of construction and interpretation.

A long list of decisions of state courts may be cited holding certain laws (largely "social and industrial justice" laws) unconstitutional as not "due process of law" and decisions by the United States supreme court holding similar laws constitutional as being "due process of law."³

Let us assume that the people would agree with the United States supreme court. Is it not a cumbersome, inept method for executing the popular will to require that in each of these cases an amendment to the constitution must be submitted to the people of the state and approved by popular vote and then that the legislature must reenact the same law previously passed? What is the logic of this long and laborious process? Why should a new clause be added to the constitution when no change in its language is necessary? Why should the complicated and expensive legislative machinery be again called upon to remake a law when the very vote of the people proves that the law was constitutionally enacted the first time?

The crux of the whole question is obtaining an expression, by popular vote, of "the prevailing morality or strong and preponderant opinion."

Why then submit the question as: "Shall the constitution be amended so as to empower the legislature to pass this law?"

The legislature has passed the law.

The supreme court has rendered an opinion that the law is not supported by the strong and preponderant opinion of the people.

The logical question to submit is:

Did the legislature in passing this law represent the "prevailing morality or strong and preponderant opinion of the people?"

If the people answer "No," the opinion of the supreme court on this very question is sustained—because the court was right.

If the people answer "Yes," the opinion of the supreme court on this very question is overruled—because the court was wrong.

³ Address on the "Recall of Decisions" by Albert M. Kales, before the Illinois Barr Association, April, 1912.

In cases involving the "police power" of a state the review by the people of a decision would be logical procedure to attain a logical result. Amendment of the state constitution in such cases is an illogical means to an illogical end.

Compare the two in parallel columns:

In cases where a state supreme court is of opinion that the "police power" of the state does not authorize the legislature to pass a certain law. Assume that the "strong and preponderant" opinion of the people favors the law.

PRESENT METHOD BY AMENDMENT OF CONSTITUTION		PROPOSED METHOD BY RECALL OF OF DECISIONS	
Probable Time	AN ACT	AN ACT	Probable Time
1 year	(1) Passed by legis- lature.	(1) Passed by legisla- ture.	1 year
	(2) Approved by governor.	(2) Approved by gov- ernor.	
	(3) Held "unconstitu- tional" by state supreme court.	(3) Held "unconstitu- tional" by state supreme court.	
2-5 years	(4) Constitutional amendment passed by legis- lature (once or twice) or initiated by the people.	(4) Petition for review of decision. Same purpose as consti- tutional amend- ment but more accurately ex- pressed and more expeditious.	2 years
	(5) Constitutional amendment adopted by popular vote.	(5) Act approved and decision reversed by popular vote. <i>Becomes a law.</i>	
3-7 years	(6) The same act again passed by legislature.	(6) Unnecessary dupli- cation.	
4-9 years	(7) The same act again approved by governor.	(7) Unnecessary dupli- cation.	
5-10 years	(8) The same act held "constitu- tional" by state supreme court <i>Finally becomes a law.</i>	(8) Only needed to correct errors in 6 and 7 which are omitted — hence useless.	

Comments on diagram. Step 4. Under present method this procedure may take one year on direct initiation or immediate legislative action or possibly four years where the constitution requires that an amendment be passed by two sessions of the legislature or even ten years or more where a constitutional convention alone can amend. The sole purpose of the action is to submit the question to a popular vote. If the people are going to approve, why delay them? If they are going to disapprove, why delay them? Only those interested in sustaining minority government can find any virtue in preventing expressions of majority opinion. Furthermore there is something peculiarly inappropriate in the form of amending the constitution to change something which is not written in the constitution at all, but which appears in an opinion of the supreme court.

Steps 6 and 7 are simply waste effort. The legislature and the governor have gone through the travail of creating a law—only to see it smothered by the court. Why create a similar law if the old one can be revived?

Step 8 gives the supreme court the ungracious task of reversing itself, with all the incentive naturally incident to that painful process to find technical flaws in the manner in which its opinion has been set aside.

When one contemplates the possible delay of ten years in correcting the mistake of the supreme court in interpreting the prevailing convictions of the time—one understands the reason for a deep resentment in the community against "judge-made law." A partly corrupt legislature is lashed by public opinion into passing a "general welfare" law over the protests of special interests. Then the supreme court, deaf to the prevalent voices of social reform, annuls the law. The whole bitter struggle must be fought over again: a constitutional amendment passed once or twice (many states require the passage twice), the law passed again, perhaps loaded with new "jokers" so that the court will again declare it void.

The struggle for social justice under such conditions is a disheartening battle against overwhelming odds.

To wait ten years for a law to fit the new needs of a rapidly changing civilization is often to make a farce of government. In ten years the automobile, once a rarity in the streets, dominates the traffic, wireless telegraphy remakes conditions of sea travel, the phonograph, the trolley car, the aeroplane, moving pictures, a score of new and important factors affect the daily life of the people. All industry undergoes like changes. New problems, responsibilities and community interests come upon us and must be reckoned with and the law must change to meet them.

The statement has been made that more fundamental changes in the industrial and social order occurred between A. D. 1800 and A. D. 1900 than in the thousand or even two thousand years preceding A. D. 1800. Have the constitutions changed to meet the new needs?

In "The American Commonwealth," Mr. Bryce, commenting on the difficulty of amending the Constitution of the United States points out (p. 373) the results of a too rigid fundamental law in language which might well be applied to state constitutions which although more readily amended also require more frequent revision.

Since modification or developments are often needed and since

they can rarely be made by amendment, some other way of making them must be found. The ingenuity of lawyers has discovered one method in interpretation, while the dexterity of politicians has invented a variety of devices whereby legislation may extend or usage may modify the express provisions of the apparently immovable and inflexible instrument.

Amendment by construction, like executive non-enforcement of unpopular laws and indirect taxes, is a method of self-delusion which belongs to a passing school of politics. Fooling oneself is a rather stupid game and the American people show many signs of a present-day willingness to look facts in the face, to discuss the disagreeable truths of poverty and inefficiency as well as to orate about "prosperity" and the "land of the free and the home of the brave."

Our constitutions are human products with human imperfections and need constant improvement. Our judicial decisions, be they ever so honestly made, are the products of the education and environment of ordinary human beings—called judges. The ermine may require respect for the office but it does not guarantee the wisdom or social conscience of the wearer.

In the end faith in democracy requires a trust in the superiority of the ultimate judgment of the whole people over the immediate judgment of a few of the people. There is no reply to Lincoln's assertion that the people are the rightful masters of both their constitutions and their courts, except the denial of the capacity for self-government, which in itself is a repudiation of the constitutions and the courts of democracy.

Those who would enshrine the judiciary as "sacred" from the control of the people are not believers in democracy. And frank reactionaries freely state their conviction that the people must be "saved from themselves." By whom? Plainly, not by themselves.

There is in the end but one honest choice: either government is to be of the people, by the people and for the people, or of a few, by a few, and for a few. History records no instance of permanent government of the few for the many. The benevolent rulers of one generation beget the hated tyrants of the next epoch. The "free and independent judiciary" enthroned above the will of "transient majorities" may all too easily become the reactionary, oppressive oligarchy that sets aside the legislative enactments of sovereign states, that coerces executives to refuse obedience to the expressed will of the people.

Summary

Where the legislature and the courts disagree as to what the "prevailing morality" demands, the people alone can decide the controversy. In this way alone justice can be secured.

Amendment of constitutions is a cumbersome, inappropriate means for deciding conflicts between the legislature and the courts over the extent of the "police power."

The "recall of decisions" is a logical means since there is nothing in the constitution to amend, and the only question involved is: Did the court or the legislature correctly represent the "prevailing morality or strong and preponderant opinion" of the people?

The final issue between those intelligently favoring and opposing the "recall of decisions" is the world-old issue between democracy and oligarchy. Some believe in a divine favoritism in capacity for government. Others put their faith in the self-governing instinct of all mankind. To accept the sanctity of a judicial decision requires belief in the superhuman quality of the judge or in the inspired quality of his opinion. To accept the superiority of the crystallized opinion of all the people over the judgment of a few of the people requires faith in humanity itself.

There is the issue. The battle lines are drawn for the future, as in the past, between the conservative, fighting to retain the things that are, trusting to the wisdom of old counselors; and the progressive, pressing forward to what may be, with confidence in the greater wisdom of coming generations.

**Election of Judicial Judgments; Address Before the Denver,
Colorado, Bar Association, February 21, 1914.**

Rome G. Brown.

The Recall in Colorado

And yet, you have here today in Colorado that same system of decision and of the review of decisions, the very contemplation of which brings only a shock, a shudder of abhorrence to any person who can and will appreciate its real significance. And let me say that the courts of this state deserve to be subjected to this humiliation—to which they even more than the general citizenship is subjected by these subversive innovations,

—if they refuse or even hesitate to assert, at every opportunity, their conscientious convictions with regard to the repugnancy of your judicial recall constitutional amendments, and of any legislation under them, to the express prohibition of the federal constitution and to the fundamental principles of our system of constitutional government.

Your state has set the goal, not in the march of progress but in the retreat of retrogression, far back of the point set by any other state. Some other states have also made retreats to some extent from the general onward movement of the nation's progress, by establishing the recall of judges. Other states may yet fall back. But the general advancement which has been marked by the steady progress of our nation in science, in industry, in prosperity, in the incentive to the development of communities and of individuals afforded by the feeling of security of freedom from oppression and of the stability of our institutions,—this general advancement will persist. It may be handicapped for a time by the retrogressive policies or lack of policies of particular communities, but ultimately the fact will be everywhere recognized that change does not necessarily mean progress; and that rules of conduct, which cannot be arbitrarily set aside to suit the individual or majority passion or caprice, are as essential to the administration of popular government as they are to guide and preserve the morality of the individual in his social relations.

Under the recent Colorado amendment a supreme court decision declaring unconstitutional any state statute may be made ineffective by a majority of the votes cast by state electors at a referendum election held to pass upon the decision complained of. If the decision applies to certain city, or city and county, charter provision, the decision may be recalled by a majority of the votes cast by electors of the municipality in question at a referendum election held to pass upon such decision. Thus, under the Judicial Decision Recall in Colorado, if a city charter provision is found to have the effect to take private property without compensation, or to impair the obligation of contracts, even in a case in which the city itself is party, and the court for that reason declares the charter provision unenforceable, nevertheless, a majority of those voting at a city election called to pass upon such decision may, arbitrarily, decide the

question as to whether the decision shall be enforced or not. This means that those citizens who attend such referendum election may, by a majority vote of those present, decide whether in the particular case in question the constitutional safeguards protecting rights of property or of contract shall or shall not be enforced; and this, too, either in favor of or against the city itself. A city might decide one way one day, and another way another day, with reference to the same provision. One city might decide one way and at the same time another city another way, with reference to the same provision.

Now, what do you think of the wisdom or sanity of those pseudo-reformers who pretend to view such processes of juggling with constitutional safeguards as merely "progressive" methods, as merely "a new method of constitutional amendment by popular vote"?

It is obvious that in Colorado there is established a local option with reference to the suspension or application of constitutional safeguards. The actual result there is a *reductio ad absurdum* of the decision recall argument.

The Colorado Decision Recall Amendment Is Void

It is not for me to discuss the workings of the conscience of any person, whether he be judge or lawyer. I can, however, speak for myself. My deliberate, conscientious conviction, as a lawyer, is that the Colorado Decision Recall amendment is void, as being repugnant to the Federal constitution. This conviction is based upon the following self-evident propositions:

1. The prohibitions of the Federal constitution, that no state shall pass or enforce any law impairing the obligation of contracts or contrary to the Fourteenth Amendment, depriving any person of his life, liberty or property without due process of law, or denying to him the equal protection of the laws, are the supreme law of the land; and, as such, are expressly made binding upon the conscience and judgment of every court and of every judge of every court, federal and state. Moreover, every executive officer and judge, federal and state, as well as every citizen, is bound by express oath, required by the Federal constitution, to observe and obey at all time those prohibitions, not only in their private but also in their official actions.¹

¹ Article VI. Federal Constitution.

2. The "law of the State which is thereby prohibited includes not only legislative enactments, but also State constitutional provisions; and in case of such contravention, a State constitutional provisions, as well as a State statute, must be held void.²

As stated by the United State Supreme Court:³

Upon the adoption of the Fourteenth Amendment, *whatever their own constitutions may have been, or have subsequently declared*, the states became bound, as was the United States by the Fifth Amendment, not to deprive any persons of property without due process of law.

3. Now, at present in Colorado, if a State statute or a certain city charter provision, when applied to a particular case, is found to contravene the Federal constitution and is for that reason in that case declared by your highest court to be unconstitutional, the Federal constitution leaves open at the present time no alternative, except the *enforcement* of that decision as so rendered. No other alternative is open, except in contravention of the Federal constitution, either to the executive department of the State, to the legislative department, or to the judicial department. Neither is any other alternative left open to the voters of the State, much less to the voters of any municipal division of the State. The final arbiter, under the Federal constitution, so far as the State is concerned, is the highest court of that State. Such decision cannot now be reviewed even by the Federal Supreme Court, although it is within the power of Congress to exercise its constitutional authority to make such decision the subject of Federal review, just as now it would have been reviewable if it had declared the statute or ordinance in question constitutional.

4. Except in repugnance to the Federal constitution, the State cannot give to the governor or other executive officer the arbitrary power of veto upon such decision. Likewise, it cannot give such arbitrary power of veto to the legislature, nor to any body of citizens, nor to the citizens as a whole, either of the State or of any municipality.

5. The decision recall, as contemplated in this State, is not a judicial review. It has neither the form nor substance, to any degree, of an *adjudication* of the constitutional question involved in the decision to which it is applied. It is neither in

² Bigelow v. Draper, 6 N. D., 152.

³ S. W. Oil Co. v. Texas, 217 U. S., 114, 119.

form or substance an amendment, even of the State constitution. It cannot affect, in any degree, the force of the Federal prohibitions, nor of their necessary application to the particular case in which the decision in question is rendered.

6. The annulment of such decision, or the prevention of enforcement of such decision, by the ballot at a referendum election is not a judicial review nor an adjudication. It is nothing more than a mere arbitrary veto by the ballot. It applies only to a particular decision in a particular case. Therefore, it is an arbitrary suspension, as to that decision and case, of the provision of the Federal constitution which the decision has declared to be infringed in that case by the statute or ordinance in question.

7. It is not within the power of the State, under the Federal constitution, to pass and enforce any law, constitutional or legislative, which thus gives to the voters of the State, much less when it gives to the voters of a municipality of that State, either the arbitrary veto of a final decision of the highest court of the State, or the power of arbitrary suspension, within the locality affected, of the Federal supreme law, as to the particular case in question.

8. Therefore, in any case of its attempted application, the Colorado constitutional amendment cannot, by an arbitrary ballot veto, prevent the enforcement of the decision. Moreover, the amendment which pretends to delegate such power to the ballot is in itself void.

9. Therefore, also, it is the duty of any executive officer and of any court to enforce the decision as rendered by the highest court of the State, regardless of any attempted exercise of the arbitrary veto by the ballot at any referendum election, and, as a ground for such enforcement, to hold and declare the provision for such veto—that is, the state constitution decision recall amendment—absolutely void.

The same reasoning applies to that peculiar constitutional provision of this State forbidding certain courts from declaring in any case that a statute or ordinance is unconstitutional, when such statute or ordinance contravenes the Federal constitution. The function and duty of every State judge, whether of an appellate or a nisi prius court, is fixed by the terms of the Federal constitution, and by his oath under that constitution.

It compels him in every instance when he deems a law, as applied to the case before him, to contravene the supreme Federal law, *so to declare*, and in accordance with such holding to render his judgment or decree. That duty, imposed by the Federal supreme law, cannot be abrogated or diminished by State enactment, whether by constitutional amendment or by legislative statute.

Vote "No (X)"; Prize Argument Against Recall of Judges.

Arthur O. Lee.

Recall no Remedy

As to delayed justice, long litigations and technical imperfections in our judicial system, no one can consistently claim that the exercise of the recall would tend to ameliorate these conditions. In fact, it was not originally proposed in order to meet these difficulties. However, it is claimed that we need to exercise a check upon judges who frequently usurp powers, not properly theirs, to declare laws unconstitutional. This, with the argument for a direct democracy, is advanced as a principal reason why the state of Minnesota should incorporate into its constitution the provision for the recall of public officials, including judges.

It is claimed that the courts have overstepped their authority by assuming to declare laws unconstitutional. But what is the limit of the authority of a court in a case where a law is seen in fact to be void and unconstitutional? American courts, since the beginning, have claimed this duty as a proper function under our constitutional system. Professor Thayer of Harvard, in his constitutional discussions, proves that when the judiciary declares an act repugnant to the organic law it is acting in its proper sphere. In fact this function of the judiciary has become an essential feature of our governmental system. This, then, is not usurpation, much less does it constitute a ground for adopting the recall.

When the exponents of the recall, in trying to justify their proposal, attempt to show that the judges in the good state of Minnesota are corrupt and inefficient, they miserably fail to

present an argument. The judiciary of Minnesota has always presented and gives assurance of presenting to its citizens a class of the most honorable and patriotic-spirited men in the profession. Our courts thus far have been above reproach and the criticism directed against their honesty and integrity stands unsubstantiated.

"A Retrogressive Step"

There is not one consistent reason why Minnesota should make the recall a part of the organic law of the state. It is not a constructive step. It is reactionary and retrogressive, a step back to the dark ages of government.

Analyzed to its logical conclusion the adoption of the recall means that our representative form of government is to be substituted by a direct or an unlimited democracy. No proposition could strike more directly at the heart of representative government. We are told that representative government, which is the one great political bequest from the growing development of the progressive nations of the world, has failed. We are urged in the name of "progress" to adopt the instruments of socialism, including the recall, in order that our government shall become more direct and responsive. But direct democracy is nothing new. It existed in cultured Athens and in civilized Rome. It prevailed in bloody France. The history of these nations is an instructive memory. In them direct government by the numerical majority failed. In them the ideal theory was shattered. And they had the initiative, the referendum and the recall democracy.

Ostracism in Athens operated on the same principle as does the recall. There is no essential difference between the form of those old time governments that have failed and the form now proposed. Those who uphold the recall argue that times have changed, that conditions are different and that what applied to those past nations could present no lesson to us. But, while we admit that great changes have crept over our civilization, we emphatically deny that fundamental principles and governmental axioms have materially changed. Human nature is the same to-day as it was in Greece and France. Conditions change, ingrained principles and human nature endure.

Destroys Our Form of Government

Do men realize that by instituting a direct vote on the political and economic questions confronting the judiciary in our complex American life they are casting the established idea of representative government on the rubbish heap and taking from the same rubbish heap the discarded and cast-off principle of direct and unlimited democracy? Why should we disregard historical illustration when the political history of the world shows that where pure democracy has failed representative government has succeeded on its ruins? The men who framed our splendid constitution considered the different forms of government, including direct democracy, and decided in favor of representative government, which, under our constitutional system, has become the model of the world.

Then why should we change our form of government? Are we justified in bequeathing to posterity a system of government inferior to that which we have inherited and hold in sacred trust? When conditions do not and cannot warrant a radical change, have we the moral right to undo in a single stroke the finished product of 500 years of Anglo-Saxon development of the idea of representative government?

Now, let us test the proposition of popular recall in the light of a few fundamental principles. There are certain inalienable rights which inhere in free government and which are recognized in all constitutions. Among these rights there is none more important than this—that no citizen shall be deprived of his liberty or property except by the judgment of the law and after a trial before an independent and impartial tribunal. This is the keystone of the arch. The majority of the legal voters cannot constitute itself such tribunal. If it does, there is no sure or stable protection for the rights of any individual or of any minority.

Establishes a Tyranny of Majorities

Most common among the class of cases that come up before the law are those in which one of the parties is in fact, if not in name, the people themselves or the temporarily popular majority. It is generally contended in these cases that some fundamental right of the individual or of the minority is being violated.

In such cases how is the independence of the tribunal which is dependent upon one of the contracting parties to be maintained? Take a common case. A popular majority, through the legislatures elected by it, enacts a statute requiring railroads to carry passengers for 2 cents a mile, or say, 2 cents for 10 miles. In the test case that comes before the court the railroad claims that the act robs it of its property. The court after hearing and study of the facts, sustains this claim. Being dissatisfied with the decision, the popular majority recalls the judges who gave the decision and elects judges who will reverse the decision. Which is the determining power, Is it not the popular majority which has constituted itself the court in its own case?

Let us examine the recall in the light of another fundamental principle. When the same power which enacts a law also decides whether the particular case comes within that law, we call it a despotism. There is no separation of powers and functions. On the other hand, in a free government one body makes the law, while another body decides whether the particular case comes within the law. Thus the citizen is protected, because the legislative and judicial departments are kept separate. Now, if the popular majority not only makes the law, but also decides whether a given case falls within it, then the legislative and judicial powers are united. The government then ceases to be free. It is a despotism, the despotic tyranny of popular majorities.

Destroys Judicial Functions and Promotes Socialism

Not only is the judicial recall wrong in principle, but its effect would be to destroy the independence of the judiciary and, in the last analysis, to destroy the functions of the judiciary itself. The real progressive tendency during the last half century has been to build up an independent, untrammelled judiciary, recognizing no master, catering to no party or faction and administering justice according to law. But the recall proposition is a direct blow at this progressive development of an independent judiciary.

Basing their argument on the assumption that the judge is an agent or servant of the people, the opposition reach the conclusion that the people have the privilege of recalling their agent when he fails to satisfy the popular majority. The fal-

lacy in the argument is in the assumption that the judge is an agent of the people. He is not an "agent" in any sense of the word. The peculiar character of the judicial office makes it imperative that he exercise his functions impartially, recognizing no constituency whatever, except, as Marshall said, "his conscience and his God." To make the judge dependent upon the public in a case in which the public is a party is to make the judge dependent upon the will of one of the parties upon whose claim he is to pass judgment. No sane man would be willing to have judgment passed upon him under such circumstances. It is precisely this state of affairs which it is the main object of the Socialists to bring about. They would have the majority pass statutes confiscating private property and, by the judicial recall, allow the same majority to coerce the courts into allowing such statutes to be enforced. They would eliminate private property by eliminating the present power of the courts to protect it.

It Debases Judicial Standards

The effect of the recall upon the personnel and character of the judiciary would be anything but salutary. By the very nature of things the recall will, and necessarily must, lower the judicial standard. Claiming that the impeachment process is too cumbersome, those who advocate the recall urge that the people should be given the power to remove inefficient or corrupt judges and elect better judges. But the feasibility of this is questionable. What constitutes inefficiency or incompetency? Can you expect a defeated litigant to judge judicial capacity fairly? Is it rational to attempt to determine the legal and constitutional correctness of a judgment by popular vote? Would it not be considered irrational to have the competency of a physician passed upon by popular vote? The electorate, especially in the case of a supreme judge, would be uninformed concerning the character of a certain judge charged by a few with incompetency. How, except by an extended campaign of education costing thousands of dollars, which corporations and special interests only could afford, could the character of a judge be determined? Then what reason is there to suppose that the electorate will do better concerning the selection of the second judge? Remember that the same power which created

the bad judge in the first place is creating the next one. Is that body, to which the demagogues subtly refer as the "people" infallible?

Consider the question of corruption charged against a judge. Is it justice to have his honesty determined upon by popular vote after a heated campaign in which stump orators and demagogues have vied with one another in presenting trumped-up charges and exaggerated statements villifying the character of a judge? How will the judge single-handedly combat these agitators and attend to his judicial duties at the same time?

The indignity and disrespect to which our judges will be made subject under the threat and operation of the recall will work disaster on the personnel of our judiciary. What successful lawyer will leave his practice to hold an uncertain and discredited office? What class of judges will such a state of affairs tend to produce? Does it stand to reason that the threat of recall, hanging over the head of a judge like a sword of Damocles, will make him a better judge? Will men who possess true judicial caliber consent to being coddled into accepting an office whose tenure is controlled by fluctuating popular majorities?

Hamilton, Madison and Marshall said that the complete independence of the judiciary was absolutely essential under our form of government. In order to perform its high function the judiciary must be independent of the legislative power no less than of the power of popular majorities. To fuse the judicial and legislative function is to destroy that separateness which was intended to exist between the three departments of government. To make the judge the tool of temporary popular majority, compelling him upon threat of recall to obey every changing whim and caprice of public opinion, is to make him, not the exponent of what the law is, but of what the people, for the time being, think they want it to be. Under such a regime we shall have a government of men, not a government of laws.

But the insidious and undermining influence of the recall does not end here. The duty of the judiciary is to protect constitutional safeguards, to secure the rights of individuals and minorities, however small. A judge, held in jeopardy by threat of arbitrary recall, cannot by the very nature of things exercise this function independently, fearlessly or impartially.

He has got to look to the wishes of the faction which has made possible his election. If he disregards their mandates, this faction will, by employing the recall, proceed to replace the inflexible judge with a pliant reed, dependent upon their commands. When such a state of affairs comes to exist, as it unavoidably must under the recall, the people of Minnesota must expect the nullification of constitutional protection through the destruction of the independence of the judiciary.

By constitutional safeguards we mean those liberties and established rights which inhere in free government. The first ten Amendments embody these rights almost in their entirety. They are written into the fundamental law of our land and are the distinguishing feature of our constitution written as they are in the shape of definite constitutional provisions insuring to every citizen the right of life, liberty, property and human happiness. These limitations upon the governing power have made our government the scientific basis of the constitutions of the world. These are the limitations which by reasons of the recall agitation are being seriously threatened at the present time. The citizen who really understands that the adoption of the recall will directly, through the destruction of the independence of the judiciary, and indirectly, through the nullification of constitutional safeguards, work against the basic principles of true government, will never be found placing his mark of approval opposite the proposed amendment.

Thoroughly Impracticable

But there are further objections to this boasted cure-all, the popular recall. Its impracticability alone must prohibit it from ever becoming a workable instrument. The expense of getting petitions signed, of conducting a campaign of education regarding the qualifications of a certain judge and the outlay connected with recall election must necessarily be immoderately great, especially so in the case of a supreme court judge. The middle class, which usually bears the brunt of such burdens, will not be able to exercise the use of the recall. Rather, you will find it will be the rich, influential litigants defeated in court trials, corporation-owned and controlled presses, special privilege interests and other self-serving elements, that will have the

means and the influences to bring about the recall of a judge who dares to act without consulting their wishes.

If there ever was such a thing as bribery and corruption we shall have it in the judiciary if the tenure of that body is to be controlled by those who are financially the most powerful and influential. A campaign of slander, misrepresentation and vilification can be carried against a judge by powerful interests and the retention of a fair, impartial judge will be next to an impossibility. The recall is not an instrument designed to be employed by the forces of democracy. It is, rather, an instrument whereby plutocracy and wealth, hiding behind the protection of the recall, can perpetrate crimes darker than any which ever stained the history of the judiciary.

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